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No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term 1988

PAXSON ELECTRIC COMPANY and
WESLEY C. PAXSON, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When an immunized witness is prosecuted, do the Fifth Amendment and *Kastigar v. United States,* 406 U.S. 441 (1972), permit denying the witness a hearing and an opportunity to examine the government's investigative and prosecutorial staff to determine what "use" or "derivative use" the government may have made of his immunized testimony?

2. Does a Sherman Act conspiracy to restrain trade by agreeing to rig the bids on a single construction subcontract come to an end and the statute of limitations begin to run when the subcontract is awarded to the low bidder and there is no longer any competition between the bidders to be restrained, or does the conspiracy continue until the conspirators receive the fruits of the conspiracy in the form of final payments from the general contractor?

3. When a mail fraud prosecution is based on both "intangible rights" and "money or property" theories of mail fraud, can a conviction stand when the jury was not instructed that it must find a scheme involving "money or property"?

LIST OF PARTIES

The parties to the proceeding below were petitioners Paxson Electric Company[1] and Wesley C. Paxson, Sr., respondent the United States, and two other petitioners who are filing a separate Petition for a Writ of Certiorari, Dynalectric Company and G.W. Walther Ewalt.

[1] There are no parent companies, subsidiaries, or affiliates of Paxson Electric Company to list pursuant to Supreme Court Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Paxson Electric Company and Wesley C. Paxson, Sr. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on November 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 1559 and is reprinted in the Appendix hereto, 1a-42a, *infra.*

The opinions of the United States District Court for the Northern District of Georgia are reprinted in the Appendix hereto, 44a-80a, *infra.*

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on November 21, 1988, affirming petitioners' convictions dated April 17, 1987. The Court of Appeals denied a timely petition for rehearing on January 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. amend. V: No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty or property, without due process of law . . . .

15 U.S.C. § 1: Trusts, etc. in restraint of trade illegal; penalty

Every . . . conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

18 U.S.C. § 1341: Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 3282: Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed.

18 U.S.C. § 6002: Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,

* * * *

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

The issues presented here arose from the investigation and prosecution of alleged bid-rigging on an electrical construction subcontract on September 6-7, 1979. The indictment returned on September 19, 1986, more than seven years later, alleged that this bid was rigged by petitioner Wesley C. Paxson, Sr., president of petitioner Paxson Electric Company; G.W. Walther Ewalt, president of Dynalectric Company; and Bernard Trepte, an employee of Fischbach and Moore, Inc. The indictment charged one count of a conspiracy in restraint of trade, 15 U.S.C. § 1, and two counts of mail fraud, 18 U.S.C. § 1341, based on the mailing of the last two payments under the subcontract.

Although Paxson Electric Company was the low bidder on this subcontract, the formal subcontract executed in January, 1980 named as subcontractor a small minority-owned firm, C.C.C. Electric, Inc. C.C.C. performed the work and received the payments on the subcontract in a joint venture with Paxson Electric. Paxson Electric also entered into a joint venture with Dynalectric Company on the project.

Because the project was large and complex, there were delays and changes in the scope of the project. Work continued for a few years, and was not completed until 1984. As is typical of construction contracts, payments to C.C.C. were staggered over the life of the project, with the two final payments mailed to C.C.C. in December, 1984, and January, 1985, respectively, almost a year after the work was completed.

On September 28, 1984, approximately two years before indictment, the government compelled Mr. Paxson's testimony before a grand jury pursuant to a grant of use immunity under 18 U.S.C. § 6002. In that testimony, Mr. Paxson, *inter alia,* described the joint venture arrangement between his company and Dynalectric on this project, relating details of that joint venture's negotiation (GJ Tr. 25-27, 30, 32-33),[2] conduct (*id.* at 37), and settlement (*id.* at 63, 68), and of his dealings with Dynalectric's president, Mr. Ewalt (*id.* at 45-46, 66-67), that only he and Mr. Ewalt would know.[3] Mr. Paxson also related details of a meeting with Bernard Trepte, the government's key witness at trial, at which the government contended the bid was rigged. (*Id.* at 50). Mr. Paxson, though, denied any bid-rigging on the project. The investigation proceeded and, despite his grant of immunity, Mr. Paxson was indicted with the other defendants.

At trial, the government's theory was that the joint venture with Dynalectric described in Mr. Paxson's immunized testimony was a cover-up for a bid-rig. (R1-1-8). The government's lead trial counsel had interrogated Mr. Paxson before the grand jury. (GJ Tr. 45). Another prosecutor, who cross-examined Mr. Paxson at trial, admitted having read his immunized testimony before trial. (R21-2427-2429). Notwithstanding Mr. Paxson's repeated motions before, during, and after trial for a hearing at which the defense could question the government's investigative and

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[2] "GJ Tr." refers to the transcript of Mr. Paxson's grand jury testimony, which appears in the Record at R2-26, Ex. B.

[3] Two questions and answers about Mr. Paxson's role in the bidding of this project were the basis of his conviction in a separate action for false declarations and obstruction of justice. *See United States v. Wesley C. Paxson, Sr.*, 861 F.2d 730 (D.C. Cir. 1988), petition for rehearing filed December 27, 1988.

prosecution teams about what "use" or "derivative use" the government may have made of his immunized testimony (R2-26; 23-3075), the district court denied all requests for a hearing.

Instead, the district court held that *ex parte* affidavits and exhibits submitted by the lead prosecutor, unsealed only after trial, fulfilled the government's "heavy burden" under *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972), to prove that it made no direct or indirect use of the immunized testimony. (R3-74; 5-138, 139, 141, 143-44; 7-174). The Eleventh Circuit also approved this procedure. (33a-37a). Both the district court and the Eleventh Circuit observed that petitioner had been unable to show how the government had used his immunized testimony. (37a).

Petitioners also raised a statute of limitations defense to the charge of a conspiracy in restraint of trade, in that the indictment was returned more than five years after the bid was allegedly rigged in September, 1979, and the subcontract was formally signed in January, 1980, when any restraint of trade would have ended. Both the district court and the Eleventh Circuit, however, ruled that the conspiracy did not end when the restraint of trade was complete, but continued as long as any payments were made under the subcontract or joint venture agreements, thus tolling the statute of limitations until January, 1985. (8a; 44a-46a).

After trial, petitioners argued on appeal that this Court's intervening decision in *McNally v. United States*, 107 S.Ct. 2875 (1987), required reversal of their mail fraud convictions. The mail fraud counts had alleged both "intangible rights" and "money or property" theories of mail fraud. The indictment, which was submitted to the jury, charged a scheme to defraud DeKalb County, Georgia and the Environmental Protection Agency of "(a) money; and (b) their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project." (Indictment ¶ 23). Petitioners argued on appeal that their mail fraud convictions violated *McNally* because the jury was not required to find, nor did the evidence show, a scheme to defraud anyone of "money or property." The Eleventh Circuit, however, affirmed. (17a-33a).

REASONS FOR GRANTING THE WRIT

I. The *Kastigar* Procedure Endorsed By The Eleventh Circuit In Denying An Adversarial Hearing Violates The Fifth Amendment And *Kastigar* By Placing An Impermissible And Impossible Burden Of Proof On A Defendant To Prove How The Government Has Used His Immunized Testimony.

A procedure endorsed by the Eleventh Circuit to resolve *Kastigar* claims unravels the safety net of Fifth Amendment protections that this Court mandated in *Kastigar.* When this Court in *Kastigar* first held that "use" immunity under 18 U.S.C. § 6002 was consistent with the Fifth Amendment privilege against self-incrimination, it conditioned its approval of use immunity on the "heavy burden" to be placed on the government to prove affirmatively that it had made no use, directly or indirectly, of an immunized witness' testimony in prosecuting him. 406 U.S. at 460-62. Without explicitly defining what procedures were required by the Fifth Amendment for resolving this issue, the Court declared that the Fifth Amendment protections discussed in *Kastigar* satisfied even the most broad-ranging concerns about "use" of immunized testimony:

> Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially under the jurisdiction granting the immunity.
>
> This argument presupposes that the statute's prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or

> indirect, of the compelled testimony and any information derived therefrom . . . .

Id. at 459-60.

A practice that has taken root in the Eleventh Circuit, however, has undermined this Court's guarantees in *Kastigar.* In both this case and others, the Eleventh Circuit has endorsed a procedure (1) denying an adversarial hearing at which government personnel might be cross-examined about their "use" or "derivative use" of immunized testimony; and (2) allowing denial of a *Kastigar* motion merely on the basis of a single prosecutor's affidavits and exhibits, with no accounting for direct or indirect use of the immunized testimony by the various government personnel who were both exposed to the testimony and involved in the investigation or prosecution of the case.

On certiorari, petitioners will show that the *Kastigar* protections are meaningless without an adversarial, evidentiary hearing to determine whether and how the government "used" the immunized testimony. As Justice Marshall has emphasized, "the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities." *Kastigar,* 406 U.S. at 469 (Marshall, J., dissenting). Without an adversarial hearing, the witness has no means of knowing–much less proving–how his testimony was treated by the government. Under the Eleventh Circuit's procedure, contrary to this Court's directive in *Kastigar,* an immunized witness is therefore "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* at 460.

Here, the affidavits of only one prosecutor, who interrogated petitioner Paxson before the grand jury and who was lead counsel at trial, purported to show an independent source for the government's evidence,[4] but the affidavits completely failed to address the exposure of other government officials to the im-

[4] If certiorari is granted, petitioner Paxson will also show that the affidavits did not and could not account for all the government's evidence. That issue, however, is not raised as a basis for granting certiorari; petitioner instead relies on the far-reaching impact of the Eleventh Circuit's unconstitutional procedure for resolving *Kastigar* claims without an adequate hearing.

munized testimony, much less what use or derivative use any of them might have made of the testimony. Thus, petitioner was denied an opportunity to examine *any* of the government investigators, agents, and prosecutors who were exposed to his immunized testimony in the two-and-a-half years of investigation, trial preparation, and trial, about what "use" was made of his immunized testimony. Moreover, the government failed even to submit affidavits from these other government personnel concerning their "use" of the testimony.

While the need for an adversarial hearing exists whenever a *Kastigar* issue arises, the government's use of trial counsel who were familiar with the immunized testimony made an adversarial hearing even more essential here. The lead trial attorney, Mr. Gorey, had interrogated Mr. Paxson before the grand jury. (GJ Tr. 1). The prosecutor who cross-examined Mr. Paxson at trial, Ms. Hansberry, admitted having reviewed his immunized testimony some time before trial. (R21-2427-29). Yet the record is silent as to whether she made any use of the testimony in either the investigation or trial preparation, including specifically whether she used the testimony to anticipate Mr. Paxson's testimony in planning for his cross-examination. In failing to order a hearing even in light of Mr. Gorey's and Ms. Hansberry's familiarity with the testimony, the Eleventh Circuit appeared to deviate from other circuits' stricter view of the government's "heavy burden" under *Kastigar* when a prosecutor familiar with the immunized testimony participates in the prosecution of an immunized witness. *See, e.g., United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).[5]

To demonstrate further the inadequacy of the Eleventh Circuit's procedure, petitioner also has consistently pointed out that the government presented no evidence concerning two other key government personnel who were in a position to make "use" of the testimony. First, the government's investigator, William Wagner, conducted months of witness interviews before indict-

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[5] Even the Eleventh Circuit has warned that it is "unwise" to permit an attorney familiar with the immunized testimony to participate in the prosecution. (33a, n.26) (quoting *United States v. Byrd*, 765 F.2d 1524, 1532 n.11 (11th Cir. 1985)).

ment, was the government's "summary" witness before the indicting grand jury, and was also present at trial. (R5-143-39-40). The government has made no representation, sworn or unsworn, whether agent Wagner had been exposed to Mr. Paxson's testimony, much less put forth any evidence as to what safeguards he undertook to prevent any "use" of it. Second, the government has presented no evidence whether another prosecutor at trial, Mr. Berman, had reviewed the testimony and, if so, what steps he took to insure that no "use" or "derivative use" was made of it.

Because petitioner was denied an adversarial, evidentiary hearing to probe what uses may have been made of his testimony, petitioner stood exactly in the position of which Justice Marshall warned in his *Kastigar* dissent:

> A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

406 U.S. at 469.

The Eleventh Circuit's procedure violates the Fifth Amendment and this Court's *Kastigar* standards. First, it reduces the government's "heavy burden" under *Kastigar* by excusing it from accounting for whether and how it prevented the many government employees involved from making direct or indirect use of the testimony in the investigation, preparation, and trial of the case.

Second, it effectively shifts the *Kastigar* burden of proof to the witness-defendant to prove impermissible "use" of his testimony, once a single government employee submits affidavits denying "use" by the government *as a whole*. That burden is not only constitutionally impermissible under *Kastigar,* but is also impossible, given that the witness-defendant is denied any opportunity to discover how his testimony has been used.

The Eleventh Circuit wrongly concluded that access to some of the government's evidence alone should have revealed to petitioner whether and how the government "used" his testimony over a two-and-a-half year period. That task is no more possible than, for example, determining each ingredient and process used in Coca-Cola's secret formula merely by tasting the final product. The Eleventh Circuit penalized petitioner for his inability[6] to make this impossible showing:

> After trial, the district court turned over all the government's *in camera* evidence to Paxson. Despite his access to the government's evidence, the only alleged *Kastigar* violations which Paxson could point out to the district court either were meritless or were reiterated *Kastigar* claims raised pre-trial, which the district [court] already had rejected.

(37a).

Although the long-established practice has been to grant adversarial hearings on *Kastigar* motions, *see, e.g., United States v. Nemes*, 555 F.2d 51, 55 (2d Cir. 1977), the non-adversarial procedure employed here has crept up in other cases. The Eleventh

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[6] If certiorari is granted, petitioner will also argue that he did successfully identify some probable "uses" of his testimony, even though he had no sufficient opportunity to develop such evidence because of the procedure employed. For example, petitioner will show that the government subpoenaed records from his counsel concerning their role in the settlement of the joint venture with Dynalectric only *after* Mr. Paxson revealed their role in his immunized testimony. Petitioner will also show that the government's key witness, Bernard Trepte, omitted a significant aspect of his meeting with Mr. Paxson in his first grand jury appearance, but included that point in later testimony given after meeting with the prosecutors here. Mr. Paxson had provided that missing information in his immunized testimony.

Circuit has denied a *Kastigar* hearing in *United States v. Caporale,* 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3265 (1987), and the Third Circuit has approved a similar procedure in *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980).

The Eleventh Circuit's failure to order a constitutionally-adequate *Kastigar* hearing warrants summary reversal so that, through a proper hearing, petitioner can establish the extent to which the government has directly or indirectly used his immunized testimony. To resolve the direct conflict between the Eleventh Circuit's procedure and *Kastigar,* the direct intervention of this Court is necessary.

II. The Eleventh Circuit's Application Of The "Continuing Conspiracy" Doctrine To The Sherman Act Statute Of Limitations Extends That Doctrine Beyond Limits Recognized By This Court And Should Be Corrected By This Court.

In this Court's only case on point, the Court held that for purposes of the statute of limitations, "[a] conspiracy to restrain or monopolize trade" continues until the restraint of trade is accomplished, which in that case was "to drive [a] competitor out [of business]." *United States v. Kissel*, 218 U.S. 601, 607-08 (1910). This Court did *not* hold that the conspiracy continued so long as the conspirators reaped profits from their restraint of trade. In just the past few years, however, the Eleventh Circuit in this action and some other circuits have reached the opposite conclusion by misapplying principles from outside the Sherman Act, holding that the mere receipt of benefits from a Sherman Act conspiracy continues the conspiracy. This Court should address these over-extensions of *Kissel's* "continuing conspiracy" doctrine to restore principled analysis and to provide needed guidance to lower courts, both in the Sherman Act and other areas, consistent with *Kissel* and this Court's other decisions.

The Eleventh Circuit and other circuits[7] have varied from *Kissel's* delineation of a Sherman Act conspiracy. These Courts

[7] *See United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States v. Northern Improvement Co.*, 814 F.2d 540, 542 (8th Cir.),

have allowed the government to "extend" a Sherman Act conspiracy simply by alleging in the indictment that the receipt of "benefits" from the conspiracy was part of the conspiracy. On certiorari, petitioners will show that this approach (a) violates this Court's precedent in *Kissel* because it does not look to the time the restraint of trade ends; (b) invites arbitrary, inconsistent, and even absurd results when applied to statute of limitations questions under the Sherman Act and other statutes; and (c) defeats the policies underlying all statutes of repose.

The error in need of correction in these circuits is their failure properly to apply this Court's distinction between the "central criminal purpose" of a conspiracy, *Grunewald v. United States*, 353 U.S. 391, 401 (1957), and its continuing "result," *Kissel*, 218 U.S. at 607. The Court in *Kissel* and *Grunewald* established that the mere results of a conspiracy do not continue it for statute of limitations purposes. In *Kissel*, this distinction turned on what the substantive statute made illegal--the restraint of trade--so that the conspiracy continued until the restraint of trade had been completed. *Id.* at 607-08. The Eleventh Circuit in this case has ignored this distinction. Instead of looking to what the substantive statute prohibits, it looked to whether the government has drafted the indictment to allege that inevitable benefits are to be considered part of a Sherman Act conspiracy.

In contrast to the predictable, bright-line rule of *Kissel*, the Eleventh Circuit's focus on the timing of benefits received will produce arbitrary and inconsistent results, depending on the offense at issue. Compare two different types of offenses, one in which all the benefits tend to be realized immediately (*e.g.*, a conspiracy to embezzle), and another in which the proceeds tend only to be realized over a period of years (*e.g.*, a Sherman Act conspiracy to rig a bid). A defendant charged with the first type of offense enjoys the protection of the statute of limitations, while a defendant charged with the second type of offense does not,

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cert. denied, 108 S.Ct. 141 (1987); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 244-46 (4th Cir. 1986); *United States v. Inryco, Inc.*, 642 F.2d 290, 293-94 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982).

simply because the proceeds from the second type of offense can only accrue over several years.

The arbitrariness and inconsistency of the Eleventh Circuit's rule are also apparent in comparing prosecutions for the same offense. For example, if, instead of cash, a conspirator's reward is rental property, that conspiracy would continue indefinitely–perhaps *forever*–so long as he received periodic rental payments. The form and timing of payment is thus an arbitrary measure of whether the conspiracy continues within the statute of limitations.

The instant case illustrates this arbitrariness. This alleged conspiracy concerned a single act of bid-rigging in September, 1979, with a resulting subcontract executed in January, 1980. Because this major construction project was not completed until 1984, the final payments from that subcontract were not made until late 1984 and early 1985. Any restraint on competition for that subcontract, however, ended no later than January, 1980, when the subcontract was formally executed. Nonetheless, under the Eleventh Circuit's theory, petitioners are treated vastly differently than, for example, a group of small contractors who conspired to rig a bid on a small, one-year construction project in 1980. In short, there is no principled basis for relying on the terms of payment to determine how the statute of limitations applies.

The Eleventh Circuit's approach also abandons the important policies underlying statutes of repose, in favor of a vague, unprincipled inquiry into "benefits." As this Court has emphasized, our society deems it important "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). This Court went on to re-emphasize that criminal statutes of limitations are "to be liberally interpreted in favor of repose." *Id.* at 115 (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932), and *United States v. Habig*, 390 U.S. 222, 227 (1968)).

The values promoted by statutes of repose in no way depend on when "benefits" were realized. In this case, the government needed only prove that petitioners conspired to rig a bid in 1979 for a subcontract executed in January, 1980. Thus, the critical events in question took place at least six years before the indictment and at least seven years before the trial. The timing of payments over a lengthy construction project make it no less likely that "the basic facts [in 1979] may have become obscured by the passage of time." *Id.* at 114. The Eleventh Circuit's rule, therefore, undermines the important policies emphasized by this Court in *Toussie.*

To reconcile these recent decisions of the Eleventh Circuit and other circuits with this Court's application of the "continuing conspiracy" doctrine to Sherman Act conspiracies in *Kissel,* plenary review by this Court is necessary.

III. The Eleventh Circuit Has Contradicted This Court And Another Circuit In Affirming Mail Fraud Convictions When The Jury Was Not Instructed That It Must Find A Scheme Involving "Money or Property."

In *McNally v. United States*, 107 S.Ct. 2875 (1987), this Court rejected the "intangible rights" theory of mail fraud and held that a mail fraud conviction cannot stand if "the jury was not *required* to find that [the alleged victim] was defrauded of any money or property." *Id.* at 2882 (emphasis supplied). The Eleventh Circuit, however, has adopted a rule (1) that allows a jury to consider "intangible rights" allegations in the indictment and (2) that does *not* require the jury to be instructed that it must find a deprivation of "money or property." As the Eleventh Circuit nonetheless recognized, its decision is in conflict with the Tenth Circuit's interpretation of the jury finding "required" by this Court in *McNally,* and it noted that a Sixth Circuit decision presented the same conflict. (24a-25a) The importance of this direct conflict between, on one side, this Court in *McNally* and the Tenth Circuit, and, on the other side, the Sixth and Eleventh Circuits, merits this Court's attention.

The subject of this conflict--the "required" jury finding of lost "money or property"--is the linchpin of the *McNally* doctrine. It is this jury finding which assures that a defendant's acts were in fact prohibited by the mail fraud statute. The conflict among the circuits on this issue has broad importance: it affects every mail fraud case in which the jury was not instructed that it *must* find a deprivation of "money or property" to convict.

This jury was not *required* to find any deprivation of money or property. The jury received a copy of the indictment alleging both "intangible rights" and "money or property" theories of mail fraud. (R24-3316) (*see supra* at 5). The jury instructions did not limit "scheme to defraud" to the "money or property" theory, but rather defined "scheme" as "*includ[ing]*" plans to obtain "money or property." (R24-3326) (emphasis supplied). The instructions also provided that it was "*not necessary* that the government prove *all of the details* alleged in the indictment concerning the *precise nature or purpose of the scheme.*" (R24-3327) (emphasis supplied). In fact, the district court's instruction on Count One directed the jury not to consider whether there was a loss of money or property through an "overcharge" on the subcontract:

> [I]t does not matter whether the prices paid . . . were reasonable or unreasonable, high or low, fair or unfair. (R24-3320).

The full court of the Tenth Circuit has unanimously rejected the view adopted by the Eleventh Circuit in affirming these mail fraud convictions. In *United States v. Shelton*, 848 F.2d 1485, 1496 (10th Cir. 1988) (en banc), the Tenth Curcuit recognized that "[u]nder *McNally*, instructions on the elements of mail fraud must require the jury to find that the victim of the scheme was itself defrauded of money or property." *Id.* at 1495 (emphasis original). Remaining true to *McNally,* the Tenth Circuit held that an instruction that a mail fraud scheme "includes" those schemes involving money or property "does not *require* the jury to find such a loss." *Id.* at 1496 (emphasis original). In contrast, the Eleventh Circuit declined to follow the Tenth Circuit's close adherence to *McNally* and instead agreed with the Sixth Circuit's conclusion that the jury instructions need merely place "emphasis on the deprivation of

money or property." (25a) (quoting *United States v. Horton*, 847 F.2d 313, 320 (6th Cir. 1988)).

The rule adopted by the Eleventh Circuit is bad law and bad policy generally. First, it circumvents this Court's edict in *McNally* that a mail fraud conviction cannot stand if "the jury was not required to find" a deprivation of money or property. *McNally*, 107 S.Ct. at 2882. Consistent with the Tenth Circuit's view in *Horton*, a jury instruction "requiring" such a finding is the only reliable means to ensure such a finding.

Second, the Eleventh Circuit's approach supplants the jury's role in applying the instructions actually given, a role that not only protects a defendant's right to a jury trial, but also avoids a messy and impossible attempt by a reviewing court to determine what the jury must have concluded. The Eleventh and Sixth Circuits' approaches require *ad hoc* decisions by each panel of each court of appeals, who must wade through each unique trial transcript and measure the evidence by widely varying indictments and jury instructions. Inevitably, inconsistencies in decisions will result, not only between those circuits insisting on explicit jury instructions and those circuits like the Eleventh that do not, but also among panels in any given circuit attempting to apply this imprecise rule. Thus, on a national scale, this Court's intervention is necessary to prevent these inconsistent results and to protect each accused's right to a jury's determination of his fate.

The instant case illustrates the importance of this conflict over *McNally*'s "required" jury finding and the flaws in the Eleventh Circuit's approach. With bid-rigging alleged, the "money or property" element of mail fraud required that the jury find an "overcharge" in the contract awarded--i.e., a higher than competitive price. Applying its challenged rule and substituting itself for the jury, however, the Eleventh Circuit held that this jury necessarily found an "overcharge," even though, as shown below, (1) the district court explicitly instructed the jury that the price level of the contract was irrelevant; (2) the district court repeatedly ruled that no overcharge had been proved; and (3) the district court prevented the defense from litigating the issue of "overcharge" because it deemed that issue irrelevant under pre-*McNally* law.

First, the Eleventh Circuit's conclusion that the jury found an overcharge contravened the district court's explicit instruction to the jury not to consider whether there was an overcharge:

> [I]t does not matter whether the prices paid . . . were reasonable or unreasonable, high or low, fair or unfair. (R24-3320).

The Eleventh Circuit's opinion omitted any discussion of this instruction. (23a-25a).

Second, the Eleventh Circuit's *post hoc* finding of an overcharge contradicted the district court's repeated findings that there was no evidence of an overcharge:

> [T]here isn't *any evidence* from the government that the prices were at a level where the jury could infer fraud or where the jury could infer a bid rig. (R20-2158) (emphasis supplied).
>
> Well, I don't believe there is *any evidence* in the record at this point that would permit the government to argue that the jury could infer that the bid was rigged because of the *prices.* (R20-2155) (emphasis supplied).
>
> The Government has not introduced *any evidence* to show that the *profits that were made were excessive.* (R10-334) (emphasis supplied).

Third, the Eleventh Circuit's after-the-fact finding of an overcharge ignored the district court's wholesale exclusion of the defense evidence offered to rebut any inference of "overcharge," based on the district court's view that this issue was irrelevant under then-governing law:

> [By defense counsel:] . . . I want to establish that the estimates and budgets established by the county were above the bid amounts for purposes of showing at least at the time it was bid, it was below that and to rebut the inference which the Government tries to draw ultimately from questions that prices must have been fixed because profits on the job were high.
>
> . . . .

> THE COURT: . . . I have not interpreted the Government's argument that way. On that basis, I'm going to sustain the anticipated *relevance* objection to your questions.
>
> *I don't believe that the question of whether DeKalb County really got a good deal after all is an issue that is presented to the jury,* and that is why I'm going to sustain the objection. (R13-917) (emphasis supplied). [8]

Even the government acknowledged at trial that under then-governing law, the jury need not be instructed that it must find an overcharge to convict:

> [By government cousel:] I think the proper instruction is that the jury *doesn't need to make a finding* with respect to an *actual increase in the bid price or that profits were excessive* in order to reach a determination the defendants are guilty. (R23-3094) (emphasis supplied).

Thus, the illogic and arbitrariness of the Eleventh Circuit's interpretation of this *McNally* rule is proved by its own application of the rule to these facts. As petitioners will also show if certiorari is granted, application of that rule not only contradicts *McNally*, but also raises serious Confrontation and Due Process problems because the rule permits a reviewing court to invent jury "findings" on issues never even presented to the jury.

This Court's guidance is necessary to resolve the split in the circuits over this fundamental and recurring issue after *McNally*.

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[8] Although not raised as a separate basis for granting certiorari, if review is granted, petitioners will also show that the evidence cited by the Eleventh Circuit (26a-28a) as proving an "overcharge" did not show any overcharge, as petitioners would have proven at trial had the district court allowed them to litigate this issue.

CONCLUSION

For the reasons set forth herein, this petition for certiorari should be granted.

This 8th day of February, 1989.

Respectfully submitted,

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Appendix A
Opinion of the United States Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
DYNALECTRIC COMPANY; Paxson Electric Company; G.W. Walther Ewalt; Wesley C. Paxson, Sr., Defendants-Appellants.
No. 87-8451.
United States Court of Appeals,
Eleventh Circuit.
Nov. 21, 1988.

Defendants were convicted in the United States District Court for the Northern District of Georgia, No. CR86-350A, Orinda D. Evans, J., of conspiring to violate antitrust laws and two counts of mail fraud, and they appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) indictment was timely; (2) jury must necessarily have convicted defendants of scheming to defraud victims of money, and not just an intangible right to free and open competition, possibly exempt from mail fraud statute; (3) evidence was sufficient to support mail fraud convictions; (4) scheme to defraud did not have to succeed in order to convict defendants of mail fraud; (5) Government made no direct or indirect use of grand jury testimony defendant gave under grant of immunity; (6) defendant's offer to stipulate to intent was inadequate; (7) witness' testimony about phone call he received from unidentified caller on morning bids were submitted was admissible as statement of coconspirator; and (8) jury was not tainted by extrinsic evidence.

Affirmed.

John R. Lowery, Kutak Rock & Campbell, Atlanta, Ga., for Dynalectric and Ewalt.

Emmet J. Bondurant, Bondurant, Mixson & Elmore, Atlanta, Ga., for Paxson.

Rodney O. Thorson, Skadden, Arps, Slate, Meaher & Flom, Washington, D.C., for Dynalectric.

John J. Powers, III, Dept. of Justice, Main Appellate Section, Andrea Limmer, Washington, D.C., for U.S.

James H. Kelley, McGuire, Woods, Battle & Boothe, Washington, D.C., for appellants.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, Chief Judge, and ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

ANDERSON, Circuit Judge:

Defendants Dynalectric Co., Paxson Electric Co., G.W. Walther Ewalt, and Wesley C. Paxson, Sr. appeal from their criminal antitrust and federal mail fraud convictions. Each defendant was convicted of one count of conspiring to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and two counts of violating the federal mail fraud statute, 18 U.S.C. § 1341. We affirm.

I. FACTS

The corporate defendants in this case, Dynalectric Co. ("Dynalectric") and Paxson Electric Co. ("Paxson Electric"), are electrical contracting companies. The individual defendants, G. W. Walther Ewalt ("Ewalt") and Wesley Paxson, Sr. ("Paxson"), are the presidents of Dynalectric and Paxson Electric, respectively. This case arises from an alleged conspiracy among the defendants and Fischbach & Moore,[1] another electrical contracting company, to rig the bidding on the electrical subcontracting portion of a major construction project at the Snapfinger Creek Wastewater Treatment Plant in Dekalb County, Georgia. Dynalectric, Paxson Electric, and Fischbach & Moore were the only electrical contractors who submitted bids on the Snapfinger project.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] Fischbach & Moore was named in the same indictment as the defendants but opted to enter a guilty plea prior to trial.

In 1982, the Justice Department empaneled several grand juries in the District of Columbia and began a wide-ranging investigation into allegations of bid rigging in the electrical contracting industry. Some records of the Snapfinger project were subpoenaed in 1982. In September, 1984, Paxson testified before the grand jury pursuant to an immunity order. His testimony was that he had never participated in bidrigging and specifically that the Snapfinger project was not rigged. Following Paxson's exculpatory testimony, [2] the grand jury did not probe further into the Snapfinger contract until Bernard Trepte ("Trepte"), a Fischbach & Moore employee, testified extensively about the Snapfinger bidrigging before the grand jury in October 1985. Subsequently, the Justice Department revived its investigation of the Snapfinger project. As a result of this investigation, the defendants were indicted on September 19, 1986.

The gist of the conspiracy was that the conspirators agreed on their bid prices before they submitted their Snapfinger bids, thereby circumventing the competitive bidding process. The conspirators agreed that Paxson Electric would be the low bidder. Paxson Electric prepared its bid and then notified Dynalectric and Fischbach & Moore what their bids should be. In exchange for their cooperation, Paxson Electric agreed to forgive an $89,000 debt of Fischbach & Moore and to evenly divide the Snapfinger profits with Dynalectric. The defendants characterized the arrangement between Paxson Electric and Dynalectric as a silent joint venture.

The conspiracy was fleshed out when Ewalt, Paxson, and Trepte met in an Atlanta hotel room the evening before the Snapfinger bids were submitted. Trepte and Paxson first came to terms; Trepte originally had pushed for Fischbach & Moore to get the Snapfinger contract but eventually agreed to let Paxson Electric be the low bidder if Dynalectric also agreed to go along with the scheme. Trepte then left the hotel room and was told that if Paxson could convince Ewalt to participate in the bid rigging, he would receive a phone call notifying him of what Fischbach & Moore's bid should be. Trepte received a call the next day inform-

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[2] *See note 28, infra.*

ing him of the bid price. As a consequence of that call, he raised Fischbach & Moore's bid by $500,000.

The bids were submitted on September 7, 1979. Paxson Electric was the low bidder for the electrical subcontracting portion of the Snapfinger project and was awarded the subcontract by the George Hyman Company ("Hyman"), the general contractor who was awarded the overall Snapfinger contract. [3] On the $5 million dollar Snapfinger contract, Paxson Electric made a profit of approximately $1.7 million and paid half of this amount--$880,000--to Dynalectric pursuant to their alleged silent joint venture agreement. Evidence at trial established that Dynalectric did virtually no work on the Snapfinger project, yet received half of Paxson Electric's profits. Paxson Electric made its final payment to Dynalectric in 1983 and received its final payment via mail from Hyman on January 24, 1985.

The defense at trial was that the joint venture was a legitimate one consummated in order to allow Paxson Electric to overcome anticipated minority representation problems in its dealings with Hyman. The defendants contended that the joint venture was not entered until several months after the Snapfinger bidding. They also denied that Ewalt, Paxson, and Trepte had met the evening before the bidding to discuss rigging the bids.

II. DISCUSSION

A. *Statute of Limitations: Criminal Antitrust Conspiracy*

The defendants first challenge the district court's holding that the indictment was not barred by the five year statute of limitations for criminal conspiracies, 18 U.S.C. § 3282. We affirm.

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[3] The subcontract actually was awarded to CCC Electric Co., a minority business enterprise ("MBE") in which Paxson Electric had a 49% ownership interest. However, all the bid preparation work and the submission of the bids was handled by Paxson Electric. Hyman, the general contractor, required the use of an MBE to meet the requirements of the EPA and Dekalb County, who paid for the Snapfinger construction. For convenience in this opinion, we shall refer to Paxson Electric as the company which was awarded the subcontract.

Section 3282 provides that the statute of limitations runs for five years "after [the] offense shall have been committed." [4] The indictment was filed on September 16, 1986. The district court concluded that the antitrust conspiracy was not committed (i.e. completed) until Hyman made the last payment to Paxson Electric in January 1985 and therefore that the indictment was filed well within the five year limitation period. The appellants argue that at the latest, the conspiracy was committed on January 14, 1980, the date on which the contract was entered after the bids were submitted in September 1979. They argue that the payoffs from Paxson Electric to Dynalectric (the last of which were in 1983) and the payments from Hyman to Paxson Electric (the last of which was in January 1985) were results--rather than objectives--of the conspiracy. The task before us is to decide whether the conspiracy to restrain trade was committed when the contract was awarded to Paxson Electric following the submission of rigged bids or whether the conspiracy continued either until Paxson Electric received the last payments under the contract or until Paxson Electric made the last disbursement of the illicit profits to Dynalectric pursuant to the alleged joint venture agreement.

We agree with the district court. The case law, applied to the particular facts of this case, amply supports the district court's conclusion that the payments from Hyman to Paxson Electric, pursuant to the Snapfinger subcontract, and the payments from Paxson Electric to Dynalectric, pursuant to the alleged joint venture agreement, were elements of a continuing conspiracy to restrain trade rather than merely the results of a completed conspiracy.

Our analysis of the relevant cases begins with *United States v. Kissel,* 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), the seminal Supreme Court case interpreting the criminal statute of limitations in the context of an antitrust conspiracy. Justice Holmes, writing for the Court, concluded that a conspiracy can have

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[4] 18 U.S.C. § 3282 provides that: Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

"continuance in time." 218 U.S. at 610, 31 S.Ct. at 127. Holmes explained that a criminal conspiracy continues in time beyond the initial conspiratorial agreement until the objectives of the conspiracy either are abandoned or succeed. *Id.* Holmes also explained, however, that once the objects of the conspiracy succeed or are abandoned, "the mere continuance of the result of [the] crime does not continue the crime ... for purposes of the statute of limitations." 218 U.S. at 607, 31 S.Ct. at 126.

To determine the extent to which a conspiracy continues over time, we must determine the objectives of the conspiracy. In any given case, the limits of a conspiracy to restrain trade depend on what the conspirators agreed to do. As the Supreme Court explained in *Grunewald v. United States,* 353 U.S. 391, 397, 77 S.Ct. 963, 970, 1 L.Ed.2d 931 (1957), "the crucial question in determining whether the statute of limitations has run is the scope of conspiratorial agreement for it is that which determines both the duration of the conspiracy and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." In short, *Kissel* and *Grunewald* teach that a conspiracy continues until the objectives of the conspiracy succeed or are abandoned and that to determine the objectives of any given conspiracy, the court must look to the conspiratorial agreement.

The relevant contours of a conspiratorial agreement in any given case are those charged in the indictment. *United States v. Northern Improvement Co.,* 814 F.2d 540, 542 (8th Cir.), *cert. denied,* --- U.S. ----, 108 S.Ct. 141, 98 L.Ed.2d 98 (1987); *United States v. Inryco, Inc.*, 642 F.2d 290, 293-94 (9th Cir.1981), *cert. dismissed,* 454 U.S. 1167, 102 S.Ct. 1045, 71 L.Ed.2d 324 (1982); *United States v. Davis*, 533 F.2d 921, 929 (5th Cir.1976) [5] ("For purposes of the statute of limitations [18 U.S.C. § 3282] the overt acts alleged in the indictment and proved at trial mark the duration of the conspiracy."); *United States v. Helmich*, 704 F.2d 547 (11th Cir.), *cert. denied,* 464 U.S. 939, 104 S.Ct. 353, 78 L.Ed.2d 317

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[5] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

(1983). [6] Paragraph 18(d) of the indictment clearly alleges that two "substantial terms" of the "continuing agreement" among the conspirators were that Paxson Electric would earn profits on the rigged Snapfinger contract and that it would disburse fifty percent of those profits to Dynalectric in accordance with a silent joint venture agreement. [7] In addition, Paragraph 17 of the indict-

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[6] The appellants contend that the charges raised in the indictment and the evidence presented at trial are irrelevant to a determination of when a Sherman Act conspiracy is completed for purposes of the statute of limitations. They contend that the extent of an antitrust conspiracy is strictly a matter of statutory interpretation of § 1 of the Sherman Act. Section 1 prohibits "every contract, combination, ... or conspiracy, in restraint of trade or commerce."

We agree that to determine when the limitations period begins to run, it is necessary to interpret the statute which allegedly was violated. However, the purpose of this exercise is to determine whether the conspiracy offense requires an overt act. If an overt act is necessary, then the indictment must charge and the evidence at trial must show that an overt act in furtherance of the conspiracy was made in the limitation period. If an overt act is not required, then the indictment suffices if it charges that the conspiracy continued into the limitations period. As this court explained in *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir.1983), *cert. denied*, 466 U.S. 973, 104 S.Ct. 2349, 80 L.Ed.2d 822 (1984):

> [A] conspiracy requiring an overt act is deemed complete for the statute of limitations purposes at the time of completion of the last overt act. This is a rule of statutory construction, rather than a factual determination of whether a conspiracy existed at a particular point in time. With respect to conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished.

We note that an overt act is not required for a § 1 Sherman Act conspiracy violation. *United States v. A-A-A Electrical Co.*, 788 F.2d 242, 245 (4th Cir.1986). The instant indictment clearly charged and the evidence presented at trial showed that the receipt of payments under the contract and the sharing of these payments pursuant to the joint venture agreement were objectives of the conspiracy and that the appellants pursued at least some of these objectives until January 1985. Thus, the indictment sets forth a conspiracy that was completed well within the limitations period. Even assuming arguendo that an antitrust conspiracy requires overt acts, the payments and payoffs would constitute overt acts made in furtherance of the conspiracy within the limitations period.

[7] Paragraph 18 of the indictment charged:

ment charged that the conspiracy continued through at least January 1985.[8] Thus, it is clear from the indictment that the scope of the conspiratorial agreement specifically encompassed Paxson Electric's receipt of payments under the Snapfinger contract and Dynalectric's receipt of a percentage of these profits in consideration for its participation in the conspiracy, and that the fulfillment of the objectives of the conspiracy continued through January 1985. The indictment, filed in September 1986, therefore was timely.

Every circuit that has addressed this issue has concluded that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five year statute of limitations until either the final payments are received under the

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18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators, the substantial terms of which were that:

(a) defendant Paxson Electric would submit the lowest bid to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;

(b) the defendant companies would submit collusive, artificially high and rigged bids to Hyman and other general contractors for the electrical construction portion of the Snapfinger Creek project;

(c) in return for defendant Fischbach and Moore's participation in the conspiracy, defendant Paxson Electric would forgive a pre-existing debt of $89,330.06; and

(d) in return for defendant Dynalectric's participation in the conspiracy, defendant Paxson Electric would form a silent joint venture with defendant Dynalectric pursuant to which defendant Dynalectric would receive 50 percent of the profits earned from the performance of the electrical construction portion of the Snapfinger Creek project.

[8] Paragraph 17 of the indictment charged:

17. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and others, known and unknown, engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Title 15, United States Code, Section 1.

illegal contract or the final distribution of illicit profits among the conspirators occurs. *See United States v. A-A-A Electrical Company,* 788 F.2d 242 (4th Cir.1986); *United States v. Northern Improvement Co.,* 814 F.2d 540 (8th Cir.1987); *United States v. Inryco, Inc.,* 642 F.2d 290 (9th Cir.1981), *cert. dismissed,* 454 U.S. 1167, 102 S.Ct. 1045, 71 L.Ed.2d 324 (1982); and *United States v. Evans & Associates Constr. Co.,* 839 F.2d 656 (10th Cir.1988). We find the reasoning in these cases persuasive, particularly the analyses of the Fourth Circuit in *A-A-A* and the Eighth Circuit in *Northern Import.* [sic].

In *A-A-A*, the appellants submitted collusive bids for an electrical construction project. A federal indictment charging appellants with violating § 1 of the Sherman Act was issued more than five years after the bids were submitted and the contract was awarded but less than five years after appellants received the final payments under the contract and made the final distribution of the illicit profits. Similar to the indictment in this case, the indictment in *A-A-A* charged "that the conspiracy by its terms included the rigging of a bid, the securing of an artificial price for the ... project, and payoffs to the coconspirators who helped secure the project." 788 F.2d at 245.

The *A-A-A* appellants argued that the conspiracy was complete when they submitted the bids and that the payments received and the payoffs made did not restrain trade and thus were irrelevant for determining when the statute of limitations began to run. *Id.* at 244. The Fourth Circuit rejected both of these arguments. The court held that a criminal conspiracy to restrain trade should be treated the same as any other criminal conspiracy for purposes of determining the limitation period. *Id.* at 245. The court recognized that a § 1 Sherman Act violation can occur without any overt act, and hence that a party could suffer "legally cognizable harm" before any overt acts took place. However, the court emphasized that as with any criminal conspiracy, the relevant date in the statute of limitations analysis is the date on which the last overt act in furtherance of the conspiracy is made, *not* the date on which a party suffers "legally cognizable harm." *Id.* Hence, although the payments and payoffs were not necessary

elements of a criminal antitrust conspiracy to restrain trade, they constituted overt acts made in furtherance of the conspiracy.[9]

The court also concluded that securing payments under the contract and making payoffs to fellow conspirators "were necessary to the successful consummation of the bid-rigging agreement," *id.*, i.e. were necessary objectives of the agreement, and that therefore under *Kissel* and *Grunewald* the statute of limitations did not begin to run until these objectives succeeded or were abandoned.

In *Northern Improvement*, the appellants submitted bids on several municipal improvement projects. Rather than agreeing that one of the appellants would submit the low bid on each of the three contracts and thereafter share the profits with the other

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[9] One of appellants' arguments is that a continuing conspiracy to violate the Sherman Act does not exist unless there is a continuing substantive antitrust violation. In other words, appellants argue that to be a part of a continuing conspiracy, the payments themselves must be illegal acts, i.e., in restraint of trade. If the payments themselves are not in restraint of trade then appellants conclude that the conspiracy to restrain trade ends when the contract is awarded.

We accept *arguendo*--but explicitly do not decide--appellants' argument that the restraint of trade ended when the contract was awarded. However, we do not believe that the conspiracy is as narrowly circumscribed. The indictment clearly alleged that the appellants conspired and agreed to submit collusive bids on the Snapfinger project, to receive payments from Hyman pursuant to the contract, and to divide the payments under the alleged joint venture agreement. The cases are clear that all acts which are part of an illegal conspiracy do not themselves have to be illegal. For example, in *United States v. Helmich*, 704 F.2d 547 (11th Cir.), *cert. denied*. 464 U.S. 939, 104 S.Ct. 353, 78 L.Ed.2d 317 (1983), the defendant was convicted of conspiracy to commit espionage. He transmitted classified information in 1964 to the Soviet Union and attempted to collect his compensation from the Soviets in 1980. He was indicted in 1981. Helmich argued that the indictment was barred by the five-year statute of limitations for criminal conspiracies because the transmittal of defense information was the only substantive crime under the espionage statute. He argued that getting paid for his efforts was not illegal, thus the 1980 collection attempt could not be the subject of a prosecution for conspiracy to commit espionage. *Id.* at 549. The court rejected this argument, explaining that "the legal as well as the illegal aspects of an agreement are all part of a conspiracy to commit an illegal act for statute of limitations purposes." *Id.*; *see also United States v. Mennuti*, 679 F.2d 1032, 1035-36 (2d Cir.1982) (Conspiracy to commit mail fraud continued until the conspirators

conspirators, the appellants arranged the bids so that each conspirator was the low bidder on one project. Consequently, the conspirators did not divide the profits each made on its particular contract. The indictment was filed within five years after the appellants received final payments under the contracts but more than five years after the bids were submitted and the contracts awarded.

The district court concluded that the conspiracy terminated when the bids were submitted, in part because "there was no sharing of spoils after the payments on the contracts...." 814 F.2d at 541. The Eighth Circuit reversed. After noting the indictment plainly charged that the appellants agreed to rig the bids " 'with the expectation that [the agreed upon] low bidder would be awarded the project and paid by the city awarding the project ...,'"

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received their payoffs, even though the payoffs themselves were not illegal under the mail fraud statute. Thus, the five year statute of limitations was not violated when the substantive mail fraud offense was committed in December 1975, the payoff was received in July 1976, and the indictment was returned in February 1981.); *United States v. Walker,* 653 F.2d 1343, 1348-50 (9th Cir.1981), *cert. denied,* 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982) (In a § 371 prosecution for conspiracy to defraud the government by bid rigging a timber sale, the conspiracy continued for statute of limitations purposes until the profits were received and divided among the conspirators, even though the contract was awarded outside the statute of limitations.); *Koury v. United States,* 217 F.2d 387, 388 (6th Cir.1954) ("A conspiracy is not ended by the illegal transportation of a stolen car when the fruits of the transportation are yet to be obtained and divided by the conspirators."); *United States v. Xheka,* 704 F.2d 974, 987 (7th Cir.), *cert. denied,* 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682 (1983) (18 U.S.C. § 371 conspiracy to destroy building with explosives continued after the building was destroyed until conspirators either received the economic benefits (insurance proceeds) that motivated the crime or abandoned their claim).

The *Helmich* court distinguished *Grunewald* on the same basis as we do in this opinion: the concealment efforts in *Grunewald* were not an objective of the conspiratorial agreement, whereas the compensation Helmich received from the Soviets clearly was part of a conspiratorial agreement to commit espionage, even though the payments were not received until sixteen years after he actually spied for the Soviets. Analogously in this case, even if we assume that the contract payments and the payments made pursuant to the joint venture agreement were not in restraint of trade, they clearly were objectives of the conspiracy to restrain trade. Thus, the statute of limitations did not begin to run until these objectives were achieved or abandoned.

the Eighth Circuit reasoned that receipt of payments--in addition to rigging the bids--was a central purpose of the conspiracy to restrain trade. *Id.* at 542, quoting the indictment. The court also held that the unilateral receipt of payments under the contract was an overt act which furthered the conspiracy, regardless of the fact that there were no payoffs from the illicit profits. *Id.* at 543 n. 1.

We now turn to the specific arguments which appellants raise in this appeal, many of which were addressed and rejected by the four circuits that previously have considered this corner of the law.

Appellants primarily rely on *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir.1978), *cert. denied,* 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82 (1979). *Darbyshire* is a civil antitrust case involving a virtually identical bid rigging conspiracy in which the court had to determine when the civil statute of limitations, 15 U.S.C. § 15b, began to run. The civil statute of limitations provides that a civil antitrust action must be brought within four years after the cause of action accrues.[10] The *Darbyshire* court held that in a bid rigging case, a civil antitrust cause of action accrues when the contract is executed; at that point, the plaintiff's damages are fixed and ascertainable. *Id.* at 523.

The appellants assert that the requirement that damages must be ascertainable before the civil statute of limitations begins to run is a requirement above and beyond the criminal limitations requirement that the conspiracy must be completed. In other words, appellants contend that in a civil antitrust case, the conspiracy must be completed *and* the plaintiff's cause of action must have accrued before the statute of limitations begins to run. Therefore, they contend that the court's holding in *Darbyshire* necessarily means that the conspiracy was completed when the contract was executed. Appellants offer no cases supporting their interpretation of *Darbyshire*, i.e., that a civil antitrust cause of

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[10] 15 U.S.C. § 15b provides in pertinent part:

> Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued....

action cannot accrue before the conspiracy is completed. We note that this interpretation directly conflicts with the Fourth Circuit's decision in *A-A-A* that the criminal antitrust "statute of limitations begins to run, not from the date of the legally cognizable harm, but from the date of the last overt act." 788 F.2d at 245; *see* discussion of *A-A-A, supra.*

We conclude that *Darbyshire* is not helpful in this case because it does not involve an interpretation of the appropriate statute of limitations. The requirement that a cause of action accrue in a civil antitrust case before the statute of limitations begins to run is separate and distinct from--not cumulative to--the requirement in a criminal antitrust case that the statute of limitations begins to run when the conspiracy is completed. As the Fourth Circuit explained in *A-A-A:*

> We reach this conclusion [that a conspiracy to restrain trade encompasses receipt of payments for purposes of the criminal statute of limitations] mindful of the fact that the ... statute of limitations ... for civil antitrust actions begins to run at the time the antitrust cause of action accrues and that the continued receipt of payments may not constitute a continuing violation of the antitrust laws for civil statute of limitations purposes.... The present case, however, is ... [not controlled by the civil statute] but by an entirely different statute governing the limitations period for criminal conspiracies, including those of a continuing nature.

788 F.2d at 246 n. 4.

Moreover, nothing in *Darbyshire* addressed the duration of the conspiracy. The *Darbyshire* court did *not* hold that the cause of action accrued and the statute of limitations began to run *because* the conspiracy was complete nor did *Darbyshire* explicitly or implicitly hold that civil damages could not be ascertained before the conspiracy terminated. Thus, we agree with the government that accrual of a cause of action for civil statute of limitation purposes and completion of the conspiracy for criminal statute of limitations purposes are two entirely different and distinct issues.

The appellants also contend that the primary objective of a conspiracy to restrain trade in a § 1 Sherman Act case is the restraint of trade itself and that after the rigged bids are accepted, the restraint of trade ends. They argue that the payments received under the Snapfinger subcontract are results of the conspiracy, rather than objectives of the conspiracy.

We disagree. It is inconceivable to us that any business would conspire to restrain trade solely for the sake of restraining trade; the attendant battery of civil and criminal penalties for antitrust violations simply is too threatening to convince us that anybody would attempt to restrain trade without also having the further goal of financial self-enrichment by virtue of the restraint of trade. We believe that a central objective of a conspiracy to restrain trade is to garner illicit profits. We find persuasive the Eighth Circuit's explanation of the objectives of a criminal conspiracy to restrain trade through collusive bidding:

> We do not deal here with criminal behavior that is an end in itself. Common sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded public improvement contracts at anti-competitively high prices and to be paid for those contracts.... [T]he object and purpose of [the] illegal agreement [to collusively rig bids] was 'illicit gain,' the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.

Northern Improvement, 814 F.2d at 542. *See United States v. Rodgers*, 624 F.2d 1303, 1310 (5th Cir.1980) (a bidrigging scheme "would have been meaningless, incomplete, and futile without final award and payment...."), *cert. denied sub nom., Anthony J. Bertucci Constr. Co. v. United States*, 450 U.S. 917, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). Therefore, we reject the appellants' argument that receiving payments under the contract or distributing illicit profits among the conspirators cannot as a matter of law be an objective of a conspiracy to restrain trade. The conspiracy continues so long as one or more of the conspirators continues to

receive payments under a collusive contract--i.e. as long as they continue to realize a central and obvious objective of the conspiracy.

We also disagree with the appellants' contention that the joint conspiratorial action necessary for a conspiracy ended when they submitted the rigged bids. The continued cooperation of Paxson Electric and Dynalectric was evident in two respects long after the bids were submitted in early 1980. Paxson Electric divided the illicit profits with Dynalectric pursuant to the joint venture agreement. The final payment to Dynalectric was made in 1983, well within the five-year limitation period. At least from Dynalectric's perspective, these payments were a crucial element of the jointly conceived and executed conspiratorial plan; these payments would not have occurred if the parties had ceased to cooperate.

Continued cooperation tacitly was evidenced by Dynalectric's silence after it had received its final payoffs under the joint venture agreement. Dynalectric's silence was necessary if the conspiracy was to be successfully carried to fruition, i.e., if Paxson Electric was to receive all of its illicit profits via receipt of the subcontract payments from Hyman.

The appellants argue that the payments from Paxson Electric to Dynalectric and Dynalectric's silence after it received the final payment under the joint venture agreement constitute efforts to conceal the completed crime. In *Grunewald*, the Supreme Court held that conspirators' efforts to conceal their actions after they had accomplished the objectives of the conspiracy were not part of the overall conspiracy. 353 U.S. at 402, 77 S.Ct. at 972. The Supreme Court carefully limited its holding to cases involving concealment of the illegal activities *after* the main objectives of the conspiracy were accomplished. The court pointed out the difference between concealment done in furtherance of the objectives of the conspiracy, such as kidnappers hiding out until they receive the ransom or car thieves repainting a stolen car, and concealment done to cover up the crime itself, such as kidnappers covering their tracks after they had received the ransom. 353 U.S. at ----, 77 S.Ct. at 974.

The payments Paxson Electric made to Dynalectric were important objectives of the conspiracy, rather than "hush money" paid to conceal a completed crime. Thus, our conclusion that these payments continued the conspiracy is not at odds with *Grunewald.* An analogous case is *United States v. Walker,* 653 F.2d 1343 (9th Cir.1981), *cert. denied,* 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982). In *Walker,* the defendant defrauded the government by submitting collusive bids and later splitting the illicit profits with the other conspirators, in violation of 18 U.S.C. § 371. The Ninth Circuit concluded:

> We do not agree with [the defendant] that the acts of contract performance and division of profits are analogous to coverup activities and thus barred by *Grunewald.* However, even if we were to accept this tortured analogy and apply the *Grunewald* test, those acts formed part of the conspiracy because they did not *follow* the accomplishment of its central criminal objectives but rather were acts in *furtherance* of those aims, viz, obtaining and dividing the excess profits made on the timber. [Defendant's] definition of the objective of the conspirators as limited to obtaining the award from the Forest Service is far too narrow.

Id. at 1348 (emphasis in original). The *Walker* court also noted that "[w]ithout the continuing cooperation of his co-conspirators, bought by the payoffs to them in various forms, the scheme would have fallen apart." *Id.* at 1347.

We also believe that Dynalectric's cooperative silence from 1983, when it received its final payment under the joint venture agreement, to 1985, when Paxson Electric received its final payment from Hyman, is akin to the kidnapper awaiting the ransom or the car thief repainting the car. In other words, Dynalectric's continued tacit cooperation was necessary to the "successful accomplishment of the crime." *Grunewald,* 353 U.S. at 405, 77 S.Ct. at 974; *A-A-A,* 788 F.2d at 245.

As a final matter, we note that if we were to adopt the appellants' argument that the conspiracy concludes when the contract is awarded following the rigged bidding, we would effec-

tively eliminate the difference that the Sherman Act explicitly makes between *contracts* and *conspiracies* in restraint of trade. We conclude that a conspiracy to restrain encompasses more than a contract in restraint of trade. The distinction between a contract in restraint of trade and a conspiracy in restraint of trade was explicitly noted by the Supreme Court in *Kissel* where Justice Holmes wrote that "[a] conspiracy in restraint of trade is different from and more than a contract in restraint of trade." 218 U.S. at 608, 31 S.Ct. at 126. Therefore, we reject the appellants' interpretation of the Sherman Act that makes its provisions redundant.

B. *Mail Fraud Claims*

We turn next to defendants' challenges to their mail fraud convictions. Each defendant was convicted of two counts of mail fraud. The basis of each mail fraud count was a payment check mailed from Hyman to Paxson Electric.

1. McNally claim

First, defendants mount a challenge based on *McNally v. United States*, --- U.S. ----, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The federal mail fraud statute makes it illegal to use the mails to execute a scheme to defraud a person or entity of money or property. 18 U.S.C. § 1341.[11] In *McNally*, the Supreme Court held that the mail fraud statute did not apply to schemes to defraud citizens of their intangible right to honest government.[12] Subsequently, in *Carpenter v. United States*, --- U.S. ----, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Supreme Court clarified that the

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[11] 18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do ... [uses the mails or causes them to be used,] shall be fined ... or imprisoned ... or both.

[12] In our discussion of the applicability of the mail fraud statute to schemes to defraud various types of rights (i.e., monetary or non-monetary, property or non-property, tangible or intangible), we recognize that in all cases the government also must prove an appropriate use of the mails to obtain a conviction under the mail fraud statute.

mail fraud statute did apply to schemes to defraud a victim of intangible *property* rights. *See United States v. Italiano,* 837 F.2d 1480 (11th Cir.1988) (extensive discussion of *McNally* and *Carpenter* and the ramifications of these cases on the application of the mail fraud statute).

The rule of law we discern from *McNally* and *Carpenter* is that the only fraudulent schemes exempt from the mail fraud statute are those involving intangible, non-property, non-monetary rights (hereinafter "McNally-type intangible" rights). Put another way, *McNally* and *Carpenter* teach that the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible. *See United States v. Asher,* 854 F.2d 1483 (3d Cir.1988) ("Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, *McNally's* proscriptions would prevent upholding conviction on appeal. Where, on the other hand, a violation of the rights involved would result in depriving another of something of value, and the indictment, the proofs and the instructions are based on that fact, then the presence of intangible rights language will not prove fatal on appeal."); *United States v. Wellman,* 830 F.2d 1453, 1462 (7th Cir.1987) (*McNally* addressed "rights whose violation would ordinarily result in no concrete economic (or to use Justice Stevens' term, 'monetary') harm."); *United States v. Baldinger,* 838 F.2d 176, 179 (6th Cir.1988) (From *McNally* and *Carpenter,* the Sixth Circuit concluded that the Supreme Court "clearly intended to exclude from the reach of the mail fraud statute claims which did not involve a direct intention to deprive another of a recognized and traditional property right (tangible or intangible)....").

Defendants contend that a scheme to defraud the EPA and Dekalb County of their right to free and open competition falls within the bounds of *McNally*; hence, they assert their mail fraud convictions are infirm. In the plethora of post-*McNally* cases addressing challenges to pre-*McNally* mail fraud convictions, the courts uniformly have looked to the wording of the indictment and the jury instructions to determine if the convictions can stand. If the indictment and jury instructions were phrased in such a way

that the jury *could* have convicted the defendant of scheming to defraud the victim of a *McNally*-type intangible right, the courts have reversed the convictions.[13] Conversely, if the jury necessarily *must* have concluded that the defendant schemed to defraud the victim of a non-*McNally* type of right (i.e. a monetary or property right, whether tangible or intangible), then the convictions stand, even if the indictment charged and the jury was

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[13] *See United States v. Alexander,* 850 F.2d 1500, 1503 (11th Cir.1988) (jury was instructed that the alleged fraudulent scheme had three objectives, one of which was " 'to fraudulently deprive the citizens of a county of their right to have the county's business conducted honestly ...' " and that to convict the defendants of mail fraud, " 'you [the jury] need only to find that the scheme sought to achieve only one of these objectives....' " (quoting the jury instructions)); *United States v. Conover,* 845 F.2d 266, 268-71 (11th Cir.1988) (In the context of a kickback scheme, mail fraud convictions were reversed where the indictment did not charge nor did the instructions require the jury to find that the defendants schemed to defraud the victim of money or property.); *United States v. Italiano*, 837 F.2d 1480, 1487 (11th Cir.1988) (mail fraud conviction vacated where the indictment failed to allege a scheme to defraud the victim of money or property and where "the jury instructions served only to exacerbate, rather than ameliorate, the infirmities which permeated the indictment."); *United States v. Covino*, 837 F.2d 65, 71-72 (2d Cir.1988) (government's theory of mail fraud, as alleged in the indictment and charged to the jury, was that the defendant employee breached a fiduciary duty to his employer by accepting kickbacks and by failing to inform the employer of the kickbacks. The court reversed the convictions, explaining that "the indictment and charge in the instant matter neither alleged nor asked the jury to find that [the victim] was defrauded of money or property."); *United States v. Baldinger*, 838 F.2d 176 (6th Cir.1988) (where defendant challenged his mail fraud conviction solely on the sufficiency of the indictment, the court found a *McNally* violation where the indictment alleged solely that the defendant devised a scheme to defraud the victims of "their right to conduct business free of false, fictitious and fraudulent information...."); *United States v. Holzer*, 840 F.2d 1343, 1345-46 (7th Cir.) (conviction reversed where indictment alleged defendant judge's receipt of bribes from lawyers appearing before him was a scheme to defraud Illinois and its citizens of "the right to the administration of justice by an honest judge" and the jury was instructed that it needed to find a plan to deprive the victims of something of value and that "[t]he thing of value that the Government says was lost here is what the lawyers call intangible rights."), *cert. denied,* --- U.S. ----, 108 S.Ct. 2022, 100 L.Ed.2d 608 (1988); *Ingber v. Enzor,* 841 F.2d 450 (2d Cir.1988) (conviction overturned where jury was charged on the alternative grounds that defendants devised a scheme to defraud the victims of money or property or to

instructed on *McNally*-type intangible rights in addition to non-*McNally* rights.[14] *See United States v. Ochs,* 842 F.2d 515, 522-24 (1st Cir.1988) and *United States v. Asher,* 854 F.2d 1483 (3d Cir.1988) (summarizing leading post-*McNally* mail fraud cases).

The defendants' *McNally* claim only can succeed if the jury could have convicted them of scheming to defraud the EPA and Dekalb County of their right to open competition and if this

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defraud them of their right to a fair and free election); *United States v. Murphy,* 836 F.2d 248, 250- 54 (6th Cir.1988) (although the jury was instructed that it could convict the defendants of mail fraud if they concluded that the defendants devised a scheme to defraud the victims of money, the convictions were reversed because the jury instructions improperly broadened the allegations of the indictment, which only alleged a scheme to defraud the victims of *McNally*-type intangible rights); *United States v. Ochs,* 842 F.2d 515 (1st Cir.1988) (Although the indictment alleged that the defendants schemed to defraud the victims of both tangible and intangible rights, the conviction was reversed because the jury was explicitly instructed that " 'You do not have to find that the City actually lost money because of this scheme. It is sufficient if you find that the scheme did defraud or deprive the public of an intangible or political or civil right, such as the right to honest government....' "); *United States v. Shelton,* 848 F.2d 1485 (10th Cir.1988) (en banc) (convictions reversed either because the indictment expressly charged only a violation of *McNally*-type intangible rights or, where the indictment charged a deprivation of both tangible and *McNally*- type intangible rights, the instructions did not require the jury to base a guilty verdict in whole or in part on the tangible rights theory); *United States v. Stack,* 853 F.2d 436 (6th Cir.1988) (although indictment charged a scheme to defraud victimof " 'right to have business conducted honestly ... *and* to obtain money by ... false and fraudulent pretenses ...' ", mail fraud convictions were reversed because jury was instructed that "'[a]ny actions designed to deprive an employer of his right to have his business conducted honestly ... may constitute a fraud within the meaning of the mail fraud statute....,'" and thus could have convicted defendants solely on a *McNally*-type intangible rights theory. (emphasis added)).

[14] *See United States v. Eckhardt,* 843 F.2d 989 (7th Cir.1988); *United States v. Fagan,* 821 F.2d 1002 (5th Cir.1987), *cert. denied,* --- U.S. ----, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988); *New York v. Hendrickson Brothers, Inc.,* 840 F.2d 1065, 1082 (2d Cir.1988) (holding in bid rigging context that mail fraud conviction withstood *McNally*); *United States v. Horton,* 847 F.2d 313 (6th Cir.1988); *United States v. Lance,* 848 F.2d 1497 (10th Cir.1988) (en banc); *United States v. Perholtz,* 836 F.2d 554 (D.C.Cir.1987); *United States v. Piccolo,* 835 F.2d 517 (3d Cir.1987); *United States v. Richerson,* 833 F.2d 1147 (5th Cir.1987); *United States v. Runnels,* 833 F.2d 1183 (6th Cir.1987); *United States v. Wellman,* 830 F.2d 1453 (7th Cir.1987); *United States v. Asher,* 854 F.2d 1483 (3d Cir.1988).

intangible right to open competition falls within the scope of *McNally.*[15] Based on the indictment and the jury instructions, we conclude that the jury must have convicted the defendants of scheming to defraud the victims of money, thus we reject their *McNally* claim.[16]

a. *Indictment*

The indictment charged that:

> 23. Beginning in or about August 1979 and continuing thereafter until at least January 1985, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators devised and intended to devise a scheme and artifice to defraud the County and the United States of America, through its agency, the EPA, of:
>
> (a) money; and

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[15] Because we hold that this jury must have found that the defendants schemed to defraud the EPA and Dekalb County of money, we explicitly do not decide whether the intangible right to free and open competition is a *McNally*-type intangible right. We also do not reach the question of whether the intangible right to open competition is "inextricably intertwined" with tangible monetary interests and therefore outside the scope of *McNally. See, e.g., United States v. Lance*, 848 F.2d 1497, 1501 (10th Cir.1988) (*en banc*) (where the government presented adequate evidence of "split deal" scheme in which the defendant billed his employer for nonexistent purchases and pocketed the payment, the court concluded that the alleged deprivation of the employer's intangible right to good government was "inextricably intertwined" with a tangible monetary loss and affirmed mail fraud conviction); *United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir.1987) (court looked to "the nature of the scheme," as established by the proof presented at trial, to determine if there was a *McNally* violation); *United States v. Washita Construction Co.*, 789 F.2d 809, 818 (10th Cir.1986) (in pre-*McNally* mail fraud case involving bid-rigging, the Tenth Circuit concluded that a collusive bidding scheme was the valid basis for a mail fraud conviction because it "deprived taxpayers of the monetary advantage of competitive bidding....").

[16] Our conclusion comports with the result in *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir.1988), which is the only case we are aware of in which a court addressed a *McNally* challenge to a mail fraud conviction. In *Hendrickson Bros.*, the Second Circuit concluded that *McNally* was not pertinent to mail fraud convictions stemming from bid- rigging scheme because "the indictments alleged that the scheme was to defraud the agencies, not to corrupt them, and the jury was instructed accordingly." *Id.* at 1082.

> (b) their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project, such bidding to be conducted honestly, fairly and free from craft, trickery, deceit, corruption, dishonesty and fraud.
>
> 24. It was part of the aforesaid scheme and artifice to defraud that the defendants, and others, known and unknown to the Grand Jury, would and did submit collusive, artificially high and rigged bids in order to induce the general contractor selected to build the Snapfinger Creek project to award the subcontract for the electrical construction portion of the project to defendant Paxson Electric.[17]

The plain language of the indictment charges the defendants with scheming to defraud the EPA and Dekalb County of *money.* While it also charges that the defendants schemed to defraud the victims of their right to open competition, the indictment is not worded in a way that would allow the jury to choose between the two theories. Rather, to convict the defendants in accordance with the indictment, the jury must have concluded that there was a scheme to defraud the victims of money and the right to open competition. *See United States v. Perholtz,* 836 F.2d 554, 559 (D.C.Cir.1988) (holding indictment was sufficient under *McNally* where it alleged defendants created a kickback scheme to defraud

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[17] The indictment further charged that:

> 25. On or about the dates of mailing set forth below, for the purpose of executing and carrying out the scheme and artifice to defraud, and attempting to do so, the defendants and others did knowingly cause the two checks listed below to be delivered by mail by the United States Postal Service according to the directions thereon, to an address within the Northern District of Georgia, each such use of the mails constituting a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1341....

The two mailings which were the basis for the two mail fraud counts were payments mailed from Hyman, the general contractor, to CCC Electric Co., the MBE subcontractor affiliated with Paxson in response to bids mailed from CCC Electric Co. to Hyman. The payments were mailed on May 24, 1984, and January 24, 1985.

the victim of its " 'lawful right to conduct business and affairs free from kickbacks ...' " and "*also*--not alternatively--one 'to obtain money and property....' " (quoting indictment) (emphasis in original)); *United States v. Eckhardt,* 843 F.2d 989, 996-97 (7th Cir.1988) (mail fraud conviction entered pursuant to plea agreement upheld where the indictment alleged a scheme to defraud the victim of intangible rights *and* "to obtain money and property by false and fraudulent pretenses.").

In *McNally*, the indictment charged that defendants schemed to defraud the government and citizens of Kentucky of "their right to have the Commonwealth's affairs conducted honestly...." --- U.S. at ---- n. 4, 107 S.Ct. at 2878 n. 4. The indictment also charged that the defendants schemed to "obtain (directly and indirectly) money ..." but did not allege that they schemed to defraud the *victims* of money. Thus, the *McNally* indictment was substantially different from the one in this case.

b. *Jury Instructions*

The jury instructions also withstand a *McNally* challenge. We note that in reviewing the sufficiency of the jury instructions, we must examine the charge as a whole rather than isolating and examining the deficiencies of individual instructions. *Italiano,* 837 F.2d at 1487; *United States v. Gordon*, 817 F.2d 1538, 1542 (11th Cir.1987), *vacated in part and rev'd in part,* 836 F.2d 1312 (11th Cir.1988). Our review of the instructions as a whole convinces us that a reasonable jury must have concluded that the purpose of the scheme was to defraud the victims of money. The jury was instructed that to convict the defendants of mail fraud, the government had to prove beyond a reasonable doubt that, among other things, "the defendant knowingly and willfully devised a scheme to defraud...." (R. 24-3326). The judge instructed that a "scheme includes any plan or course of action intended to deceive others *and* to obtain by false or fraudulent pretenses *money or property* from the person so deceived." *Id.* (emphasis added). This is directly contrary to *McNally*, where the court stated that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded on any money or property." --- U.S. at ----, 107 S.Ct. at 2882.

Of equal importance is that the jury was *not* instructed on the intangible rights theory. *No* instruction was given that the scheme to defraud could include the right to open competition. This aspect of the scheme was implicit in the instruction that the government had to prove a scheme to defraud "substantially the same as the one alleged ..." in the indictment. (R. 24-3327). As discussed above, however, the scheme alleged in the indictment was one to defraud the victims of money *and* the right to open competition. Thus, the implicit reference to the right to open competition is not in violation of *McNally. See Perholtz,* 836 F.2d at 558 (where the indictment charged a scheme to defraud the government of money and its right to conduct its business free from kickbacks and the jury was instructed that to convict it had find a scheme "substantially the same as the one alleged in the indictment," there was no *McNally* violation even though the judge explicitly charged the jury that the scheme to defraud included the deprivation of *McNally*-type intangible rights); *United States v. Piccolo,* 835 F.2d 517, 520 (3d Cir.1987) (defendant's *McNally* claim rejected where the jury was charged that to convict it must find that defendant schemed to defraud the victim " 'of its right to the honest, faithful and loyal services of its employee, ... *and further, to defraud* [victims] *of money.*' " (emphasis in original)), *cert. denied,* --- U.S. ----, 108 S.Ct. 2014, 100 L.Ed.2d 602 (1988); *United States v. Asher,* 854 F.2d 1483 (3d Cir.1988) (although jury instructions made reference to a scheme to defraud of both tangible rights and *McNally*-type intangible rights, convictions affirmed where court was "unable to hypothesize a set of circumstances under which this jury could have found [defendant] guilty of depriving the citizens of the Commonwealth of their right to honest government ... without also having found that [defendant] was involved in a scheme, the sole purpose of which was to ensure that CTA obtained a no-bid ... contract at a substantially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding.").

The defendants contend that the jury instructions are invalid under *McNally* because they do not expressly limit the fraudulent scheme to the deprivation of money and do not expressly exclude a scheme based on the deprivation of the right to open competi-

tion. For example, the defendants argue that the charge defining the "scheme", quoted above, is defective because it does not absolutely limit a mail fraud scheme to the deprivation of property but rather explains that a scheme *includes* a deprivation of tangible rights. Two other circuits have addressed *McNally* challenges to identical jury instructions defining "scheme". The Tenth Circuit agreed with the defendants, concluding that "[a]lthough the above definition of 'scheme' states that it *includes* any plan by which the victim loses money or property, use of the open- ended word 'includes' does not *require* the jury to find such a loss." *United States v. Shelton,* 848 F.2d 1485, 1496 (10th Cir.1988) (en banc) (emphasis in original).

The Sixth Circuit reached the opposite conclusion. It explained that the instruction defining "scheme" was acceptable because "[t]he clear emphasis on deprivation of money or property, combined with the absence of any instruction that the jury was free to convict Horton on the basis of the deprivation of Chrysler's intangible right to conduct its business in an honest manner compels the conclusion that *McNally* does not control the disposition of the present case." *United States v. Horton,* 847 F.2d 313, 320 (6th Cir.1988). Under the facts of this case, we agree with the Sixth Circuit that the definition of "scheme", although somewhat open-ended, does not require a reversal of the mail fraud convictions. As in *Horton*, the jury here was *not* instructed on any intangible right theory. Moreover, it is clear to us that the focus of the jury charge, read as a whole, was on the deprivation of money and property, not on the deprivation of the right to free and open competition. Finally, in this case, the only mention of the open competition theory was in the indictment, and there it was clear that there must be a scheme to defraud of both money *and* open competition.

For these reasons, we reject defendants' claim to the extent it is based on *McNally.*

2. Sufficiency of the Evidence

In reviewing a defendant's challenge to the sufficiency of the evidence supporting his conviction, we must uphold the jury's verdict if, "after viewing the evidence in the light most favorable

to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In addition, we must "make all reasonable inferences in support of the jury's verdict." *United States v. Hewes,* 729 F.2d 1302, 1320 (11th Cir.1984), *cert. denied sub nom., Caldwell v. United States,* 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 78 (1985).

a. *Sufficient evidence of overcharge*

The defendants challenge the sufficiency of the government's proof with respect to several aspects of the mail fraud convictions.[18] First, they contend there was insufficient evidence that the EPA and Dekalb County actually were overcharged because of the collusive bids. Defendants argue that there was no evidence that the bid price or profits were unreasonably high and thus no evidence of a scheme to defraud the EPA and Dekalb County of money. We conclude that there was sufficient evidence of a scheme to defraud the victims of money.[19]

In her memorandum opinion, Judge Evans cited the following as evidence of overcharge. First, Trepte testified that he agreed to raise Fischbach and Moore's bid $500,000 in exchange for Paxson Electric's promise to forgive an $89,000 debt Fischbach

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[18] The defendants do not challenge the sufficiency of the evidence which establishes the existence of the fraudulent scheme and our independent review of the record confirms that there was ample evidence that the defendants rigged the bids on the electrical contracting portion of the Snapfinger Creek project.

[19] The defendants also argue that the trial court erred in excluding economic evidence of instability in the economy and in various raw materials markets at the time the bids were submitted. The defendants offered this evidence as relevant to explain the seemingly high prices and profits on the Snapfinger subcontract. Defendants argued that because of the volatile economic environment, the bids had to be higher to account for potential price rises and that the profits turned out to be relatively high because the anticipated price fluctuations for raw materials did not occur to the extent provided for in the bid prices. Judge Evans excluded the evidence because there was no evidence that any of the people who actually prepared the bid relied on the purported volatility in assimilating the bid price. After a review of the record, we conclude that Judge Evans was well within the broad discretionary bounds given to trial judges on evidentiary matters.

allegedly owed to Paxson Electric. Trepte also testified that Paxson Electric never collected the $89,000 debt. R10-240-41. Second, there was testimony that Dynalectric received 50% of Paxson Electric's Snapfinger profits (approximately $880,000) in exchange for doing virtually no work on the Snapfinger project other than "periodic site inspections." Third, Edward Baylin, the manager of Dynalectric's Atlanta office who prepared the materials cost estimate for Dynalectric's bid testified that he could not figure out how Dynalectric's actual bid of $5.3 million was derived when the highest price he could come up with, using

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In *United States v. Goodman*, 850 F.2d 1473 (11th Cir.1988), decided after oral arguments were heard in this case, the Eleventh Circuit held that where the government introduced evidence of anti-competitively high prices to prove the existence of a criminal antitrust conspiracy, the district court's exclusion of defendant's evidence that the prices were reasonable was reversible error. *Goodman* is distinguishable from this case for three reasons.

First, Judge Evans made it clear throughout the trial that she would not allow the government to prove the existence of an antitrust conspiracy with evidence that the Snapfinger bid prices and profits were unreasonably high. Judge Evans conducted the trial on the correct assumption that because collusive bidding is a per se antitrust violation, proof of unreasonably high prices or profits was not necessary to convict defendants of conspiracy to violate the antitrust laws. Thus, in contrast to *Goodman*, Judge Evans did not allow the government to prove the requisite agreement to restrain trade through evidence of unreasonably high prices or profits. Rather, she limited the government to presenting direct evidence of the agreement (e.g., the evidence of the meeting between the defendants the evening before the bids were submitted and the resultant phone call to Trepte the following morning). *Cf. Goodman*, 850 F.2d at 1478 ("Although pricing is not an actual element of customer allocation, ... once the government used that evidence in attempting to prove the existence of the customer allocation agreement, the door was open for the appellants to rebut the same.").

Second, even if Judge Evans had allowed the government to argue the existence of the conspiracy from evidence that the profits and prices were unreasonably high, it was not error to exclude the defendants' proffered economic evidence because this evidence did not explain why the Snapfinger prices and profits were seemingly high. For example, in *Goodman*, the defendants wanted to introduce evidence that their business costs increased to explain why they charged their customers more; they also wanted to introduce evidence of their competitors' profit and loss statements to show that the competitors' prices, although lower than the defendant's prices, were not commercially reasonable because they were below cost. In the first instance, evidence of *actual* higher operating costs would

realistic (or somewhat higher) prices, was $4.7 million. R.11-444-452. There also was testimony that the profit level (approx. 40% of the contract price) was unusually high relative to comparable projects. We conclude that a rational jury could conclude from this evidence, viewing all inferences favorably to the government, that the collusive bidding resulted in overcharges on the Snapfinger contract.

b. *Sufficient evidence that overcharge passed on to EPA and Dekalb County*

The defendants contend that even if there was sufficient evidence to establish that they overcharged Hyman, the general contractor, there is insufficient evidence to show that Hyman passed along these overcharges to the alleged victims of the scheme, the EPA and Dekalb County. Defendants rely primarily on the fact that Hyman had a negotiated lump sum contract, rather than a cost-plus contract, with the EPA and Dekalb County.

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be a legitimate explanation of why the defendant raised the price they charged their customers. In the second instance, evidence that the competitors' prices were unreasonably low would tend to show that the defendant's prices, although higher, were not commercially unreasonable.

In this case, however, the defendants did not seek to explain their prices and profits by offering evidence that the actual raw material prices used to carry out the Snapfinger contract actually increased and that these prices were passed onto their customers. Instead, they attempted to use expert evidence of the alleged volatility in the raw material markets to support an argument that their bid prices reflected anticipated jumps in the cost of necessary materials and that the profits were relatively high because the materials prices in fact were not as volatile as expected when the bids were prepared. As explained above, the proffered evidence is irrelevant absent evidence that defendants actually relied on this information in preparing their bids. Because the defendants failed to prove that they relied on alleged volatility in making their bids, the proffered evidence was properly excluded, even if the government had been allowed to argue that the high prices and profits evidenced a conspiracy.

Third, the type of evidence defendants sought to introduce in this case was very different from the evidence excluded in *Goodman*. In *Goodman*, the trial court erroneously excluded the profit and loss statements of a competitor of the defendants. This evidence was directly related to the specific events and actors under scrutiny in the trial. In this case, however, the evidence was not connected to any of the actual events in the case.

However, the government presented testimony from a Hyman employee who worked on the Snapfinger bid indicating that Hyman's bid price was a direct function of the various subcontract prices obtained from allegedly competitive bids from the subcontractors. We believe that a rational jury could infer from this testimony that at least some of the overcharge was passed on to the EPA and Dekalb County.[20]

3. Jury Charge: No requirement that scheme to defraud actually succeed

The district court charged the jury that to convict the defendants of mail fraud, the jury did not have to find that the scheme to defraud actually succeeded.[21] We hold that the substance of this charge was correct: conviction under the federal mail fraud statute only requires the government to prove a scheme to defraud; the success or failure of the scheme is irrelevant. Our conclusion is supported by the language of the statute and by the cases interpreting it. The mail fraud statute itself addresses the use of the mails to further a scheme to defraud a victim of money or property. *McNally*, --- U.S. at ----, 107 S.Ct. at 2881. The statutory language does not set forth a requirement that the scheme to defraud actually must succeed in defrauding its victim of money or property.

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[20] The defendants' reliance on *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), is misplaced. The defendants assert that *Illinois Brick* precludes use of the pass-on theory where cost-plus contracts are not involved. The issue addressed by the Supreme Court in *Illinois Brick* was whether indirect purchasers of a product which the direct purchaser bought pursuant to rigged bids could collect actual and treble damages from the collusive bidders in a civil antitrust case. The court declined to allow the indirect purchasers to collect the damages, citing the difficulties inherent in proving the precise amount of overcharge passed on from the direct purchasers to the indirect purchasers. However, the Court did not hold nor imply that the absence of a cost-plus contract precludes an inference that some portion of the overcharge was passed along. Moreover, because our case does not require a calculation of actual damages, *Illinois Brick* is not controlling.

[21] Judge Evans instructed the jury that "[i]t is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature or purpose of the scheme or that the material mailed was itself false or fraudulent, *or that the alleged scheme actually succeeded in defrauding anyone....*" R.24-3327.

In addition, both pre- and post-*McNally* cases confirm our conclusion that Judge Evans correctly instructed the jury that the success of the scheme was irrelevant. *See, e.g., United States v. Keane,* 852 F.2d 199 (7th Cir.1988) ("[I]t may well be that none of this cost the City or anyone else one red cent.... But the mail fraud statute proscribes fraudulent schemes; it does not confine penalties to those whose schemes succeed in raking off cash, a point no less valid today than when emphasized on direct appeal [thirteen years ago]."); *Ward v. United States,* 845 F.2d 1459, 1462 (7th Cir.1988) ("[T]he mail fraud statute punishes the scheme to defraud, and does not require that the intended victim actually have been defrauded...."); *United States v. Baldinger,* 838 F.2d 176, 180 (6th Cir.1988) (mail fraud statute reaches schemes whose goal is " 'the transfer of something of economic value to the defendant.' Comment, *The Intangible Rights Doctrine and Political--Corruption Prosecutions Under the Mail Fraud Statute,* 47 U.Chi.L.Rev. 562, 566 (1980)"); *United States v. Asher,* 854 F.2d 1483 (3d Cir.1988) (mail fraud convictions affirmed where scheme *would have* defrauded victim of money *had it succeeded*); *United States v. Ochs,* 842 F.2d 515, 523 (1st Cir.1988) (noting that post-*McNally* cases in which convictions were affirmed were those in which "the jury was in fact explicitly required to find that the fraudulent scheme was also *intended* to cause monetary harm." (emphasis added)); *United States v. Dial,* 757 F.2d 163, 179 (7th Cir.) (mail fraud statute "punishes the scheme to defraud rather than the completed fraud itself."), *cert. denied,* 474 U.S. 838, 106 S.Ct. 116, 88 L.Ed.2d 95 (1985).

Convictions in pre-*McNally* mail fraud cases involving bid rigging withstood sufficiency of evidence challenges absent an explicit showing that the victim actually lost money. For example, in *United States v. Washita Construction Co.,* 789 F.2d 809, 818 (10th Cir.1986),

> [t]he evidence adduced at trial indicated that the conspirators arranged to win highway contracts without submitting competitive bids. The scheme devised by the conspirators circumvented the state and federal competitive bidding procedures and allowed the contractors to virtually predetermine who would be

> awarded a contract. By arranging for complimentary bids to be submitted, the conspirators deceitfully created the illusion of competitive bidding and concealed their illegal collusion.

Significantly, the court did not indicate that any evidence of actual overcharge was adduced at trial, yet sustained the mail fraud convictions in the face of a sufficiency of evidence challenge. *See also United States v. Young Bros., Inc.*, 728 F.2d 682, 689 (5th Cir.) (to withstand sufficiency challenge to mail fraud convictions, "the government was required to show that the mailings (relating to the billing and payment of the $10,001) were 'in furtherance' of the bidrigging scheme."), *cert. denied*, 469 U.S. 881, 105 S.Ct. 246, 83 L.Ed.2d 184 (1984).[22]

4. Other Challenges--Mail Fraud

The defendants' remaining challenges to their mail fraud convictions warrant little discussion. They contend that there was an insufficient causal connection between the use of the mails and their participation in the bidding scheme. They point out that the

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[22] We note that there are several post-*McNally* cases whose language might be interpreted to require proof of actual loss (i.e., proof that the scheme to defraud actually succeeded) to support a mail fraud conviction. *See, e.g., United States v. Evans*, 844 F.2d 36, 39 (2d Cir.1988) ("If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property."); *United States v. Runnels*, 833 F.2d 1183, 1185 (6th Cir.1987) ("Decisions permitting convictions despite the absence of economic loss still required that the defendant deprive the victim of some economic benefit."). This circuit's decision in *United States v. Conover*, 845 F.2d 266 (11th Cir.1988) has ambiguous language which similarly might be interpreted as requiring that the scheme to defraud must succeed. *See Conover*, 845 F.2d at 271 ("On the basis of *McNally*, it is inferable that to sustain the convictions in this case, the Government would have to offer proof and the jury would have to be instructed that [the victim] would have paid less....").

However, neither *Conover* nor any of the other cases cited above address the distinction between a successful and an unsuccessful scheme to defraud the victim of money or property. These cases do not address the issue of whether a mail fraud conviction can stand where there is sufficient evidence that the defendants schemed and intended to defraud the victims of money or property, but failed to cause the victims any actual loss. Thus none of these cases are apposite.

two mailings which are the basis for the mail fraud counts occurred in 1984 and 1985, after Dynalectric received its final payment pursuant to the joint venture agreement in 1983 and well after the rigged bids were submitted in 1979. However, as we concluded in our discussion of the statute of limitations issue, the payments from Hyman to Paxson Electric were important aspects of the conspiracy. Thus, the payments which were mailed in 1984 and 1985 clearly were integral to the scheme to defraud. *See United States v. Young Bros., Inc.,* 728 F.2d at 689 (court sustained mail fraud conviction in bid rigging context where defendant claimed that the mailings were not sufficiently closely related to the scheme to defraud; the court reasoned that mailing a payoff to a coconspirator after the rigged bids were submitted was sufficient because "it reasonably can be inferred that [the defendant] would not have agreed to the scheme on behalf of his company without being paid."); *United States v. Rodgers,* 624 F.2d at 1310 (mail fraud conviction upheld where victim mailed to defendants the final payment of a contract obtained by rigged bids; the court concluded that "[t]he scheme would have been meaningless, incomplete, and futile without final award and payment which were accomplished through the mail. Clearly, the mails were used 'in furtherance' of the scheme.").

Dynalectric's claim that there was insufficient evidence that it "caused" the mails to be used is without merit. Paxson Electric, through its affiliate CCC Electric, caused the mails to be used by requisitioning the two payments from Hyman. Evidence was presented at trial that in the ordinary course of business, the general contractor (Hyman) mails the subcontractor its contract payments following the receipt and approval of the subcontractor's payment requisition. Thus, we conclude that Paxson Electric reasonably could have anticipated that the mails would be used in the ordinary course of business to facilitate the transfer of contract payments to it (via CCC Electric) from Hyman pursuant to CCC Electric's requisition for payment. *United States v. Rodgers,* 624 F.2d at 1310 n. 17. Moreover, because Dynalectric was a knowing participant in the scheme to defraud, the actions of coconspirator Paxson Electric which caused the mails to be used in furtherance of the scheme are sufficient to make Dynalectric legally liable for

the use of the mails. *United States v. Hewes,* 729 F.2d at 1322 n. 24. As we explained in *Hewes,* "[t]he mere fact that [defendant's] role in the scheme may have ended prior to the time the [mailings] occurred does not shield him from criminal liability." *Id.* at 1324.

C. *Kastigar Claim: Wesley Paxson*

Wesley Paxson claims that the government improperly used grand jury testimony he gave in 1984 under a grant of use immunity to obtain the indictment and conviction in this case, in violation of *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).[23] This court recently explained in *United States v. Caporale*, 806 F.2d 1487, 1518 (11th Cir.1986), *cert. denied,* --- U.S. ----, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987), that under *Kastigar* "the government bears the burden of proving that testimony that a defendant gave under a promise of use immunity was not directly or indirectly used in a subsequent prosecution against the defendant. To meet that burden, the government must show by a preponderance of the evidence that its evidence in the subsequent prosecution was derived from a legitimate independent source." (*Citing Kastigar,* 406 U.S. at 460, 92 S.Ct. at 1665). However, the government does not have to "negate all abstract 'possibility' of taint." *United States v. Byrd,* 765 F.2d 1524, 1529 (11th Cir.1985). A *Kastigar* claim involves factual determinations, therefore we must affirm the district court's *Kastigar* decision unless it is clearly erroneous. *Caporale*, 806 F.2d at 1518; *United States v. Hampton,* 775 F.2d 1479, 1484 (11th Cir.1985).

Paxson's *Kastigar* claim reaches this court with a substantial track record. In the proceedings below, the *Kastigar* issue was raised and briefed on three separate occasions.[24] Prior to trial,

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[23] Paxson was granted immunity pursuant to 18 U.S.C. § 6002.

[24] *See* Record on Appeal, vol. 2-26 (Paxson's Motion to Dismiss); 2- 40 (Government's Opposition to Motion to Dismiss); 3-55 (Paxson's Reply to Government's Opposition to Motion to Dismiss); 3-59-22-33 (Magistrate's Report and Recommendation); 3-61 (Paxson's Objections to Magistrate's Report and Recommendation); 3-64-5-9 (Government's Opposition to Paxson's Objections to Magistrate's Report and Recommendation); 3-74-7-10 (District Court Order Denying Motion to Dismiss on *Kastigar* Grounds); 6-152 (Paxson's

both the magistrate and the district court issued written opinions denying Paxson's *Kastigar* motions. These decisions were issued after the magistrate and the district court judge examined *in camera*[25] transcripts of witnesses who appeared before the indicting grand jury, a transcript of Paxson's immunized testimony, and fifty exhibits submitted by the government as evidence of legitimate independent sources. In addition, the government submitted the sixty-five page affidavit of Hayes Gorey, the lead government attorney for both the grand jury proceedings and Paxson's trial. Gorey was present during Paxson's immunized grand jury appearance.[26] Gorey's affidavit meticulously linked the independent sources of evidence (i.e., the 50 exhibits) to each piece of evidence presented to the indicting grand jury and to be adduced against Paxson at trial which conceivably was directly or indirectly revealed in Paxson's immunized testimony. Gorey also submitted a post-trial supplemental affidavit. At the conclusion of the trial, these exhibits and the affidavits were unsealed and Paxson was allowed to examine them. After reviewing this evidence, Paxson renewed his motion to dismiss the indictment on *Kastigar* grounds and in the same post-trial motion asked in the alternative for a judgment of acquittal or an evidentiary hearing on his *Kastigar* claim. The district court denied this motion in its memorandum opinion.

Paxson raises no new *Kastigar* issues on appeal, nor has he "come forward with any persuasive proof that the district court's determination as to any questioned source was clearly erroneous."

Renewed Motion to Dismiss); 6-158 (Government's Answer to Motion to Dismiss); 7-164 (Paxson's Reply to Government's Opposition); 7-174-28- 33 (District Court Memorandum Opinion Denying Motion to Dismiss).

[25] The pre-trial *in camera* examination of grand jury materials was proper. *See Byrd*, 765 F.2d at 1532-34.

[26] In *Byrd* we issued a strong warning that it is "unwise" to permit an attorney who is familiar with the immunized testimony to participate in the prosecution. Nevertheless, in *Caporale*, we rejected a *Kastigar* claim on facts very similar to the instant case. Although the prosecutor in *Caporale* had read the immunized testimony, the government, as in this case, met its burden of showing an independent source for each piece of evidence. Also like this case, the prior immunized testimony was self-serving and of no real value in the subsequent investigation.

Caporale, 806 F.2d at 1518. We have carefully reviewed the record and agree with the decisions of the district court and magistrate that the government has clearly demonstrated that it made no direct or indirect use of Paxson's immunized testimony. The government convincingly demonstrated an independent source for all portions of the evidence adduced before the indicting grand jury and at trial against Paxson which conceivably had any relation to his immunized testimony. The government's evidence showed that Paxson's immunized testimony was not used as a direct evidentiary source or as a source of investigatory leads.[27]

We note that much of Paxson's immunized "testimony was self-serving and of no real value in the subsequent investigation." *Id.* at 1518-19.[28] Paxson claims that *United States v. Hampton,* 775 F.2d 1479 (11th Cir.1985), holds that the self-exonerating nature of immunized testimony is irrelevant to a *Kastigar* claim. Contrary to what Paxson urges, *Hampton* held that a defendant's non-inculpatory testimony is relevant to a *Kastigar* claim *if* it yielded direct evidence or investigatory leads. In *Hampton,* it was undisputed that the defendant's immunized testimony contained information about "several important matters and details" useful in the investigation for which no independent sources were established. *Id.* at 1486-87. In addition, in *Hampton* the government made no effort to systematically establish independent sources for all evidence it introduced to the grand jury.

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[27] To establish legitimate independent sources, the government had to show that all evidence presented to the grand jury and at trial either was in the possession of the government prior to Paxson's immunized grand jury appearance or was derived from a source independent of Paxson's testimony (i.e., that Paxson's testimony provided neither new direct evidence nor investigatory leads). *United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir.1985).

[28] In *Caporale*, the court noted that "the chief government prosecutor went so far as to state that he believed that [the defendant's] earlier testimony was untruthful." 806 F.2d at 1519 n. 34. Evidence of the self-serving nature of Paxson's immunized testimony is even stronger in this case. Paxson was convicted of perjury and obstruction of justice for his immunized grand jury testimony by the District Court for the District of Columbia. The conviction currently is on appeal to the D.C. Circuit.

By contrast, in this case the government made a thorough and organized presentation that all of its evidence which conceivably could have been attributable to Paxson's immunized testimony was derived from independent sources. More importantly, unlike *Hampton,* Paxson's self-serving testimony provided no direct evidence or investigatory leads for which the government did not have a legitimate independent source. In fact, Paxson's testimony apparently drew the Snapfinger investigation to a halt for thirteen months until Trepte's grand jury testimony revealed substantial inconsistencies with Paxson's immunized testimony about the Snapfinger project.

Paxson also claims that he was entitled to a full-blown post-trial evidentiary hearing on his *Kastigar* motion.[29] The decision to grant an evidentiary hearing lies within the sound discretion of the trial court and we review the district court's denial of the hearing only for an abuse of discretion. *See United States v. Slocum*, 708 F.2d 587, 600 (11th Cir.1983) (on appeal, district court's decision not to hold an evidentiary hearing on *Brady* and newly discovered evidence allegations subject to abuse of discretion standard of review); *United States v. Johnson,* 596 F.2d 147, 148 (5th Cir.1979) (decision whether to hold evidentiary hearing on motion for new trial "is within the trial court's sound discretion, subject to our review only for abuse"); *United States v. Dicesare,* 765 F.2d 890, 895 (9th Cir.1985); *United States v. Cardarella,* 588 F.2d 1204, 1205 (8th Cir.1978). We are cognizant of the fact that *Kastigar* motions generally are resolved following an adversary evidentiary hearing. *Byrd,* 765 F.2d at 1532. As this court stated in *Byrd*, the purpose of a *Kastigar* motion is to "ensur[e] that the government's evidence has been obtained from legitimate, independent sources...." *Id.* at 1533. However, it is clear that an evidentiary hearing is not mandated for all *Kastigar* motions and that whether a hearing is necessary to properly resolve a *Kastigar* claim depends on the particular facts of the case. *See, e.g., Byrd; United States v. Provenzano*, 620 F.2d 985, 1006 (3d Cir.) ("If the

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[29] In a post-trial motion, Paxson requested alternative remedies of dismissing the indictment on a judgment of acquittal because of a *Kastigar* violation or, at a minimum, an evidentiary hearing on his *Kastigar* motion. R. 6-152-22.

Government's documents conclusively demonstrate prior knowledge, we know of no reason why a hearing must be held."), *cert. denied,* 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980); *United States v. Lipkis,* 770 F.2d 1447, 1451-52 (9th Cir.1985) (no evidentiary hearing necessary when defendant stipulated that there were only minimal differences between immunized testimony and non-immunized testimony given several months prior to the immunized testimony).

We conclude that under the facts of this case, the district court did not abuse its discretion in declining to grant Paxson's post-trial motion for an evidentiary hearing. From their pre-trial examinations of the government's *Kastigar* evidence, both the district court and the magistrate concluded that the government had exceeded its *Kastigar* burden by presenting ample and conclusive evidence of independent sources for all evidentiary and investigatory leads which Paxson's testimony could have generated. After trial, the district court turned over all the government's *in camera* evidence to Paxson. Despite his access to the government's evidence, the only alleged *Kastigar* violations which Paxson could point out to the district court either were meritless or reiterated *Kastigar* claims raised pre-trial, which the district court already had rejected. Because of Paxson's inability to demonstrate the need for a post-trial *Kastigar* hearing after he gained access to the *in camera* evidence, coupled with the district court's in-depth familiarity with the government's *Kastigar* evidence, the court's first-hand knowledge of the evidence actually presented at trial, and the self-serving nature of Paxson's immunized testimony, we conclude that the district court's refusal to grant an evidentiary hearing was not an abuse of discretion.

In summary, we conclude that the district court was not clearly erroneous in dismissing Paxson's *Kastigar* claim.

D. *Other Issues*

1. 404(b) Evidence

The defendants claim that the district court abused its discretion by admitting 404(b) evidence of other alleged bidrigging attempts despite the defendants' offer to stipulate to the issue of

intent. Federal Rule of Evidence 404(b) allows evidence of a defendant's prior bad acts to be admitted if the evidence is relevant to an issue other than the defendant's character (e.g., defendant's criminal intent) and if the probative value of the evidence is not substantially outweighed by its prejudicial value. *United States v. Bennett*, 848 F.2d 1134, 1137 (11th Cir.1988). Judge Evans' decision to admit the evidence cannot be overturned on appeal unless she abused the wide range of discretion afforded to district court judges on evidentiary matters. *Id.*

The disputed evidence pertained to three separate alleged bidrigging attempts by Dynalectric and Paxson Electric employees. The government contended, *inter alia*, that the evidence was relevant to the defendants' intent to rig the Snap-finger bids. The defendants do not contest that the evidence was relevant to show intent,[30] but contend that the district court improperly rejected their offer to stipulate to intent. Immediately prior to the testimony of the first 404(b) witness, the defendants offered the following written stipulation, which the government refused to accept and which the district court rejected: "If the jury finds that the defendants met and agreed to fix bids as alleged, intent to restrain trade shall be presumed."

We conclude that the offer to stipulate was inadequate because it was a tautology. It is meaningless to offer to stipulate that if the defendants met *and* agreed to rig bids, they intended to restrain trade. Clearly, if they agreed to rig the bids, there is a strong inference that they intended to restrain trade. Thus, the proffered stipulation was inadequate and the district court did not abuse its discretion by rejecting it.[31]

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[30] *See United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir.1984) (In a criminal antitrust prosecution of bidrigging, 404(b) evidence of defendant's other attempts to rig bids is admissible because it is "clearly relevant to show that [defendant] acted with the intent to rig bids (rather than to enter into a joint venture)....").

[31] Because we conclude that the defendants' offer to stipulate was inadequate, we do not reach the issue of whether an adequate offer to stipulate to intent that is not agreed to by the government is sufficient to prevent 404(b) evidence relevant to intent from being admitted. *See United States v. Williford*, 764 F.2d 1493, 1498 (11th Cir.1985).

2. Anonymous Phone Call

Dynalectric claims that the district court erred by allowing Trepte, an employee of Fischbach & Moore who was intricately involved in the Snapfinger bidding process, to testify about a phone call he received from an unidentified caller on the morning the bids were submitted. Trepte testified that the caller told him what price he should use to bid on the Snapfinger job and that "there had been an arrangement that was satisfactory to the parties." The district court admitted the statement pursuant to Fed.R.Evid. 801(d)(2)(E) and we can reverse the court's decision on this issue only if it was clearly erroneous. *United States v. Alexander,* 850 F.2d 1500, 1505 (11th Cir.1988).

Statements by a coconspirator of a party made during the course of and in furtherance of a conspiracy are admissible, non-hearsay evidence under Fed.R.Evid. 801(d)(2)(E). Dynalectric claims that because the caller was unidentified, the statements could not be characterized as statements of a coconspirator; thus, Trepte's testimony about the call was inadmissible hearsay outside the scope of Rule 801.

To be admissible under Rule 801(d)(2)(E), the party offering the testimony must prove by a preponderance of the evidence "that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'in the course of and in furtherance of the conspiracy.' " *Bourjaily v. United States*, --- U.S. ----, 107 S.Ct. 2775, 2778, 97 L.Ed.2d 144 (1987). In making its evidentiary assessment, the district court may look both to the alleged hearsay statement itself and to independent outside evidence. *Id.* 107 S.Ct. at 2781-82; *United States v. Chestang,* 849 F.2d 528, 531 (11th Cir.1988), *Alexander,* 850 F.2d at 1505.

Based on the record before us, we conclude that the district court did not err in admitting the testimony about the phone call as a statement of a coconspirator made in furtherance of the conspiracy. There was independent evidence of a conspiracy and of Trepte's participation in it. Trepte testified that he met with

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The defendants' other 404(b) arguments are without merit and warrant no discussion.

Paxson the night before he received the phone call and they agreed that he would go along with the proposed bidrig if Paxson and Ewalt could reach some sort of agreement later that evening. When Trepte left the meeting with Paxson that evening, he testified that he was told he "would get a phone call to let [him] know whether they had come to terms." R. 9-188. There also is evidence that Trepte's employer, Fischbach & Moore, did in fact participate in the bidrigging scheme by raising its Snapfinger bid by $500,000. This is sufficient to establish the conspiracy without reference to the phone call. In other words, the fact that Trepte agreed to rig the bids if Ewalt also so agreed and the fact that Trepte later actually rigged Fischbach & Moore's bid after he received the phone call establishes a conspiracy. The substance of the telephone call simply bolsters this conclusion.

With respect to the relative anonymity of the caller, although Trepte did not know precisely who it was that called him, it is clear from the testimony and the context that the caller was associated either with Dynalectric or Paxson Electric. Similarly, it is clear from the context and Trepte's testimony that the call was made in furtherance of the conspiracy. We therefore conclude that the evidence of the phone call was properly admitted.

3. Juror's Introduction of Extrinsic Evidence

During an overnight recess in the jury's deliberations, one of the jurors reviewed notes she had taken during a health law class, jotted down three phrases from these notes on a bookmark, and took the bookmark and read these phrases to her fellow jurors the following morning. The phrases, which the juror informed her fellow jurors were "principles of the jury process," were:

> (1) Innocent until proven guilty; (2) All evidence and testimony is presumed truthful until proven otherwise; and (3) In dealing with conflicting evidence merely decide which has the greatest probability of being true or simply, what is the most reasonable and sensible.

Shortly thereafter, pursuant to a request made just before court had recessed the preceding day, the jury was reinstructed on the proper consideration of circumstantial evidence. Later that day the jury returned its verdicts.

Upon learning that the juror had brought her notes into the jury room, the district judge held an evidentiary hearing during which she questioned each juror about the incident. Based on the jurors' responses and the substance of the alleged extrinsic evidence, Judge Evans concluded that the juror's conduct had not created a reasonable possibility of prejudice.

Although defendants correctly state that a jury's verdict cannot stand if there is a reasonable possibility that the verdict was prejudiced by the introduction of improper extrinsic evidence, *see United States v. Perkins,* 748 F.2d 1519, 1533 (11th Cir.1984), we agree with the district court that the juror's notes on her bookmark did not create a reasonable probability of prejudice. We assume, *arguendo*, that the notes the juror brought into the jury room during deliberations constituted improper extrinsic evidence and that all members of the jury heard and remembered her comments. We conclude, however, that the substance of the notes was not dramatically different from what the judge actually charged the jury. Thus, we conclude that the district court correctly held that the jury's decision was not tainted by improper extrinsic evidence.

III. CONCLUSION

In summary, we conclude that the district court correctly held that the indictment, filed on September 19, 1986, was brought within the five-year statute of limitations for criminal antitrust actions. We also affirm the mail fraud convictions. The jury instructions and the indictment were such that the jury could not have convicted the defendant solely on a theory of the *McNally*-type intangible rights. There also was sufficient evidence to support the mail fraud convictions. Also, the jury was properly instructed that the scheme to defraud did not have to succeed in order to convict defendants of mail fraud. We also conclude that the district court did not err in admitting the 404(b) evidence or the testimony about the anonymous phone call, nor was the jury tainted by extrinsic evidence. Finally, no improper use was made of Wesley Paxson's immunized grand jury testimony.[32]

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[32] All other issues raised by defendants on appeal are without merit and warrant no discussion.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Appendix B
Order of the United States Court of Appeals
On Petition for Rehearing and Suggestion of Rehearing In Banc

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 87-8451

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DYNALECTRIC COMPANY,
PAXSON ELECTRIC COMPANY,
G.W. WALTHER EWALT,
WESLEY C. PAXSON, SR.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC
(Opinion November 21, 1988, 11 Cir., 198 _, _F.2d _).

Before RONEY, Chief Judge, and ANDERSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appendix C
Order of the United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	
DYNALECTRIC COMPANY;	:	CIVIL NO.
FISCHBACH AND MOORE, INC.;	:	CR86-350
PAXSON ELECTRIC COMPANY;	:	
G. W. WALTHER EWALT; and	:	
WESLEY C. PAXSON, SR.	:	

ORDER

This criminal action is before the court on the Magistrate's Report and Recommendation regarding Defendants' joint motions to dismiss Count One of the indictment as barred by the statute of limitations. Defendants have filed objections to this portion of the Report and Recommendation.[1]

Defendants have moved to dismiss the Sherman Act conspiracy claim, 15 U.S.C. § 1, on the grounds that it is barred by the five year statute of limitations. Defendants argue that the offense of conspiracy in restraint of trade is complete when the alleged agreement to bid-rig was made and the contract was then awarded to Paxson on September 7, 1979. As the indictment for these actions did not come out until September, 1986, nearly seven years after the agreement was reached and the contract awarded, Defendants claim that Count One is barred by the statute of limitations. The Magistrate reasoned that as the indictment alleged that the conspiracy continued to at least January, 1985, this allegation brings Count One within the statute of limitations.

As Defendants note, the Supreme Court has indicated that a Sherman Act conspiracy in restraint of trade is complete upon

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[1] Other portions of the Report and Recommendation will be addressed in a separate order.

the agreement to restrain trade. *United States v. Kissel,* 218 U.S. 601 (1910). However, *Kissel* also suggests that if the agreement envisions accomplishing a continuous result, such as driving a competitor out of business, the conspiracy continues until that result is achieved. *Id.*, at 607-608. The Court subsequently indicated that continuing results alone do not create a continuing conspiracy since continuing action by the conspirators is also required. *Fiswick v. United States*, 329 U.S. 207, 216 (1946).

Defendants argue that as the scope of the agreement determines the duration of the conspiracy, *Grunewald v. United States*, 353 U.S. 391, 397 (1957), the agreement in the instant case was to restrain trade. Thus, Defendants maintain that the agreement was complete upon award of the contract to Paxson in 1979.

While the agreement may have been to restrain trade, several courts confronted with bid-rigging cases and statute of limitations issues have suggested that the central inquiry is whether any action in relation to the conspiracy occurred after the submission of the rigged bid. Thus, in *United States v. A-A-A Electrical Company*, 788 F.2d 242, 268 (4th Cir. 1986), the court found that a $2,000 payment made to a co-conspirator during the statute of limitations period was not merely a result of the conspiracy but rather possible indication that the conspiracy was a continuing one. Similarly, in *United States v. INRYCO, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982), the court concluded that a Sherman Act conspiracy claim was not barred by the five year statute of limitations when the general contractor awarded a subcontract to a co-conspirator as consideration for the agreement during the limitations period.

Defendants have cited the recent case, *United States v. Evans & Assoc. Construction Co., Inc.*, No. CR86-77 (D. Okla. Jan. 22, 1987) for its finding that in a Sherman Act conspiracy offense based on bid-rigging, the statute of limitations runs from the date the contract was awarded. However, this case is of little persuasive value for the court since the opinion refers to no authority for its conclusion.

Relying on the principles articulated in *A-A-A* and *INRYCO*, a district court recently dismissed a Sherman Act conspiracy claim

as barred under the statute of limitations. *United States v. Northern Improvement Company*, 632 F. Supp. 1576 (D.N.D. 1986). Here, the court found that as the conspirators undertook no joint action as was present in *A-A-A* and *INRYCO*, the offense was complete upon the submission of the bid.

In the instant case, the indictment alleges that Paxson agreed to divide the proceeds of the construction contract with Dynalectric. As the indictment also alleges that Paxson received payments in 1985 under the construction contract, arguably Dynalectric did not receive its payment under the agreement until sometime in 1985 as well. A payment to Dynalectric in 1985 suffices to bring Count One within the five year statute of limitations on the theory that this payment was part of the conspirators' joint action and not merely a result of the conspiracy.

The result in *City of El Paso v. Darbyshire Steel Company, Inc.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979), does not require a different result in the case at hand. In *El Paso*, the Fifth Circuit affirmed summary judgment for defendants in a civil action brought for Sherman Act conspiracy on the grounds that the action was barred by the statute of limitations. As a civil Sherman Act claim accrues when the plaintiff has provable damages, the court held that the statute of limitations began to run from the time the agreement to bid-rig was made, irrespective of subsequent payments received by defendants under the awarded contract. As a civil action involves a different reference point than does the initiation of a criminal indictment, *El Paso* does not mean that in the instant case the offense did not continue into the limitations period.

Thus, although the agreement itself was made in 1979, the conspirators allegedly continued to act on the agreement through 1985 when payments were received under the contract. Accordingly, Count One is not barred by the statute of limitations period. Defendants' motion to dismiss Count One is DENIED.

SO ORDERED, this 2nd day of March, 1987.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Appendix D
Order of the United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	
DYNALECTRIC COMPANY;	:	CIVIL NO.
FISCHBACH AND MOORE, INC.;	:	CR86-350
PAXSON ELECTRIC COMPANY;	:	
G. W. WALTHER EWALT; and	:	
WESLEY C. PAXSON, SR.	:	

ORDER

This criminal action is before the court on the Magistrate's Report and Recommendation regarding several motions brought by Defendants Dynalectric, Walther Ewalt, Paxson Electric Company and Wesley Paxson, Sr., as well as by the government. Defendants and the government have filed objections to various portions of the Magistrate's Report and Recommendation. The court has already entered an order regarding the portion of the Report and Recommendation addressing Defendants' joint motions to dismiss Count One of the indictment under the statute of limitations. This order addresses the remaining motions.

Defendants have filed joint motions for a bill of particulars regarding information not contained in the indictment such as alleged overt acts, the time period in which the alleged contract was made, and whether the agreement is alleged to be a *per se* antitrust violation.

At a pretrial hearing before the Magistrate, the government indicated that it would disclose the names of undisclosed and unindicted co-conspirators but would not disclose their addresses nor would it disclose any other information requested by Defendants' motions for a bill of particulars. The government contends that all other requested information is improper as a

discovery request in disguise. The Magistrate concluded that the information requested by Defendants exceeds the scope of the purpose of a bill of particulars. Therefore, the Magistrate denied Defendants' joint motions except to the extent that the government had agreed to disclose the names of undisclosed and unindicted co-conspirators. Defendants object on the grounds that the requested information is necessary to the preparation of their defense and to prevent surprise at trial.

In *United States v. Rosenthal*, 793 F.2d 1214, 1227 (llth Cir. 1986), the Court stated "[A] bill of particulars may not be used to compel the government to provide the essential facts regarding the existence and formation of a conspiracy. Nor is the government required to provide defendants with all overt acts that might be proven at trial (citation omitted). Nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection." Accordingly, the court agrees with the Magistrate's conclusion that the requested information exceeds the proper scope of a bill of particulars. Defendants' joint motions for a bill of particulars are denied except to the limited extent that the government shall provide the names of undisclosed and unindicted co-conspirators. The government is directed to provide Defendants with this information within ten (10) days of date of entry of this order and no less than one week before trial.

Defendants Paxson Electric Company and Wesley Paxson, Sr. seek a bill of particulars as to the identity and description of change orders, specific invoices or work payments for which the checks referred to in Counts Two and Three of the indictment were issued by the George Hyman Construction Company. Defendants argue that this information is necessary to the preparation of their defense to the mail fraud charges. The Magistrate denied the motion on the grounds that the requested information is not properly subject to a bill of particulars but rather is a discovery request. As the court agrees that the requested information exceed the scope of a bill of particulars, the motion of Defendants Paxson Electric Company and Wesley Paxson, Sr. is denied.

Defendants have filed joint motions for pretrial *Brady* and Jencks Act material plus impeaching information and a witness list. The Magistrate granted Defendants' *Brady* material and impeaching information motions and directed the government to provide Defendants with the information one week prior to trial. The Magistrate also directed the government to provide Jencks Act material one week prior to trial based on his conclusion that the government had agreed to do so at the pretrial hearing. Defendants Dynalectric and Ewalt have objected on the grounds that disclosure one week before trial is insufficient. The government has objected to the one week pretrial production of *Brady* and Jencks Act material on the grounds that it never agreed to produce this information one week in advance but had only indicated that its production of this material would be timely.

It is the practice of this court that the government produce *Brady* material early rather than delay until the last constitutionally permissible moment. Accordingly, Defendants' joint motions for pretrial *Brady* material and impeaching information are granted and the government is directed to provide this material within five (5) days of date of entry of this order.

As to the timeliness of the requested Jencks Act material, the Act specifically provides that production is timely if provided after the witness has testified on direct examination. 18 U.S.C. §3500(a). *See also United States v. Liuzzo*, 739 F.2d 541 (llth Cir. 1984). Thus, it would not be unlawful to produce Jencks Act material after each witness has testified on direct examination. However, it would needlessly interupt [sic] the flow of the trial, and could risk annoying the jury, if recesses were required after each witness' testimony.[1] The court strongly recommends that the government produce Jencks material at the opening of the trial, at the latest.

As to Defendants' request for a witness list, the court concurs with the Magistrate that no compelling reason exists to require pretrial production of a witness list. Pretrial production of the government's witness list is a matter for judicial discretion. *United*

[1] Again, the practice in this District is for Jencks material to be provided in advance of trial. Only in rare cases, where witness intimidation or witness safety is involved, is Jencks material provided *after* the witness' direct testimony.

States v. Johnson, 713 F.2d 654, 659 (llth Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984). Accordingly, Defendants' motion for pretrial production of the government's witness list is denied.

Defendants Dynalectric and Ewalt have moved to dismiss the indictment for prosecutorial misconduct. These Defendants allege that the government manipulated the evidence before the indicting grand jury by using multiple grand juries, denied the grand jury exculpatory evidence, improperly used the grand jury for pretrial discovery, and abused and intimidated witnesses. TheMagistrate denied the motion after reviewing the record and concluding that there was no showing that the government engaged in prosecutorial misconduct. Defendants have objected to this conclusion and argue that they are entitled to an evidentiary hearing on this issue.

Having read and considered the Magistrate's Report and Recommendation and Defendants' objections thereto, the court adopts the Magistrate's Report and Recommendation as the opinion of this court with respect to Defendants Dynalectric and Ewalt's motion to dismiss for prosecutorial misconduct. Defendants' motion to dismiss is denied as is Defendants' request for an evidentiary hearing.

Defendants Paxson Electric and Wesley Paxson, Sr. have moved to dismiss the indictment on the grounds that the indictment was unconstitutionally obtained. Defendants allege similar grounds for dismissal as alleged by Defendants Dynalectric and Ewalt in their motion to dismiss for prosecutorial misconduct. Having read and considered the Magistrate's Report and Recommendation and Defendants' objections thereto, the court adopts the Magistrate's Report and Recommendation on this motion as the opinion of the court. Defendants Paxson Electric and Wesley Paxson, Sr.'s motion to dismiss the indictment as unconstitutionally obtained is denied as is Defendants' request that the grand jury material be disclosed in an evidentiary hearing.

Defendants Paxson Electric and Wesley Paxson, Sr. have filed a motion for severance. As Defendants indicated they would either amend or abandon the motion after receiving the government's Fed.R.Crim.P. 404(b) material, and Defendants

have not timely amended the motion, said motion is deemed withdrawn and abandoned.

Defendants Paxson Electric and Wesley Paxson, Sr. have moved that the court direct the clerk to reveal the dates that the first grand jury, No. 85-1, was impanelled and discharged, the dates the indicting grand jury was impanelled and discharged, and a copy of the Judge's charge to the first grand jury as to its function and purpose. Having read and considered the Magistrate's Report and Recommendation and the government's objections thereto, the Magistrate's Report and Recommendation is adopted as the opinion of this court. Defendants Paxson Electric and Wesley Paxson, Sr.'s motion for disclosure of the above information is granted and the clerk is directed to release to Defendants this information, to the extent it is in his possession.

The government has moved to seal the transcript of the September 15, 1986 hearing before Judge Forrester on Defendant's motion to quash grand jury subpoenas. As the September 15 hearing was held in open court and did not proceed on the assumption that it was subject to grand jury limitations as to disclosure, the government's motion to place the transcript under seal is denied.

Defendant Wesley Paxson, Sr. has moved to dismiss the indictment on the grounds that the government has improperly used his immunized testimony in his federal prosecution. Defendant Paxson had testified before a grand jury in the District of Columbia on September 28, 1984, pursuant to an immunity order compelling his testimony. Mr. Hayes Gorey was one of the prosecutors present when Mr. Paxson testified before the grand jury. Mr. Paxson now alleges that it is unlawful for Mr. Gorey, as a prosecutor who is familiar with his immunized testimony, to have access to that testimony and to participate in his current prosecution.

When a defendant has shown that he previously testified under a grant of immunity as to matters related to his subsequent federal prosecution, the government bears the burden of showing that it had an independent, legitimate source for the evidence

disclosed during the immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

In applying *Kastigar*, the Eleventh Circuit has focused on the source of the government's evidence used in seeking and obtaining an indictment. *United States v. Byrd*, 765 F.2d 1524, 1530-31 (llth Cir. 1985). The Court determined that *Kastigar* requires that immunized testimony cannot be used directly or indirectly for evidentiary purposes. *Id.*, at 1531. The Court suggested that *Kastigar* does not require the government to show that the "immunized testimony did not indirectly enter into a subsequent decision to prosecute." Id., at 1531. Similarly, the issue is not whether the prosecutor knew the contents of the immunized testimony. *United States v. Caporale,* 806 F.2d 1487, 1518 (llth Cir. 1986). Rather, the relevant inquiry is whether the government used the immunized testimony. *Id.*, at 1518.

Paxson's immunized testimony did not contain incriminating statements since he denied all knowledge of or participation in any bid-rigging agreement. The government has also shown that Paxson's immunized testimony did not yield any investigatory leads for the government. Further, after reviewing the material submitted by the government *in camera* and under seal, the court agrees with the Magistrate that the government has met its burden of showing by a preponderance of the evidence that the government obtained the evidence presented to the indicting grand jury from independent and legitimate sources. Thus, the government has provided a record of independent and legitimate sources for any evidence obtained during Paxson's immunized testimony.

United States v. Hampton, 775 F.2d 1479 (llth Cir. 1985) does not require a different result. In *Hampton*, the Court concluded that the government had not met its *Kastigar* burden by making conclusory statements that it had independent evidentiary sources. After examining the record, the court concluded that the government did not, in fact, have independent sources for the evidence obtained through the immunized testimony. The *Hampton* Court indicated that the government had not attempted to systematically establish independent sources for its evidence. Accordingly, the *Hampton* Court dismissed the indictment. In the

instant case, the government has made a systematic presentation of its pre-existing sources and shown by a preponderance of the evidence that the evidence presented to the indicting grand jury was obtained from sources independent of Defendant's immunized testimony.

In *Byrd*, as in the instant case, the defendant argued prior to trial that the indictment should be dismissed because the government had abused the defendant's immunized testimony. The *Byrd* Court concluded that, until there is more than a mere potential abuse of immunized testimony defendant's premature fears do not justify dismissal. *Id.*, at 1531-32.

Furthermore, a pretrial determination of whether the government has met its *Kastigar* burden may be made on the basis of evidence submitted to the court *in camera*, particularly when the government is relying on grand jury testimony. *Byrd, supra*, at 1532. Therefore, as the government is relying on grand jury testimony in meeting its *Kastigar* burden in the instant case, the court finds that an evidentiary hearing is not required. Accordingly, the Magistrate's Report and Recommendation as to Defendant Wesley Paxson, Sr.'s motion to dismiss is adopted as the opinion of this court. Defendant's motion to dismiss and request for an evidentiary hearing is denied.

In summary, Defendants' joint motions for a bill of particulars are GRANTED IN PART and DENIED IN PART. Defendants Paxson Electric Company and Wesley Paxson, Sr.'s motion for a bill of particulars is DENIED. Defendants joint motions for pretrial *Brady*, impeaching material and Jencks material is GRANTED IN PART and DENIED IN PART. The government is DIRECTED to provide Defendants with all Brady and impeaching material within five (5) days of date of entry of this order, and it is recommended that the government provide Defendants with Jencks material no later than the opening of trial. Defendants' motion for a witness list is DENIED. Defendants Dynalectric and Ewalt's motion to dismiss for prosecutorial misconduct and for an evidentiary hearing and Defendants Paxson Electric and Wesley Paxson, Sr.'s motion to dismiss the indictment as unconstitutionally obtained and for an evidentiary hearing are DENIED. Defendants

Paxson Electric and Wesley Paxson, Sr.'s motion for disclosure of the dates the two Georgia grand juries were impanelled and discharged and of the Judge's instructions to grand jury No. 85-1 as to its function and purpose is GRANTED and the Clerk is DIRECTED to release such information to Defendants, to the extent it is in his possession. Should any of these documents reveal the identity of a grand jury member, the Clerk is DIRECTED to so notify the court prior to turning any documents over to Defendants. The government's motion to seal the September 15, 1986 hearing transcript is DENIED. Defendants Paxson Electric and Wesley Paxson, Sr.'s motion to sever is withdrawn and abandoned as Defendants have not timely amended the motion. Defendant Wesley Paxson, Sr.'s motion to dismiss and for an evidentiary hearing is DENIED. Defendant Paxson Electric Company and Walter [sic] Paxson, Sr.'s request for oral argument is dismissed as moot.

SO ORDERED, this 11th day of March, 1987.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Appendix E
Opinion of the United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	CRIMINAL
DYNALECTRIC COMPANY;	:	NO. CR86-350
FISCHBACH AND MOORE, INC.;	:	
PAXSON ELECTRIC COMPANY;	:	
G. W. WALTHER EWALT; and	:	
WESLEY C. PAXSON, SR.	:	

MEMORANDUM OPINION

The instant opinion will explain the court's reasons for denying Defendants' post-trial motions. The order denying the motions was entered June 2, 1987.

A. MOTIONS FOR NEW TRIAL

1. Sufficiency of the Evidence

Defendants Dynalectric and Ewalt argue that the verdict is contrary to the weight of the evidence.

The jury's conclusion that a bid-rigging agreement was reached by Defendants Wesley Paxson, Sr. (President of Defendant Paxson Electric Company) and G. W. Walther Ewalt (President of Defendant Dynalectric Company) with Bernard A. Trepte, representative of Defendant Fischbach and Moore, Inc., on September 6-7, 1979, is supported by the direct testimony of Bernard A. Trepte.

Trepte testified he met with Wesley Paxson in Atlanta on September 6, 1979 for dinner. The bids for the Snapfinger Waste Water Treatment Project in DeKalb County, Georgia, were due the next afternoon. At that time he sought Paxson's agreement to allow Fischbach and Moore, Inc. to be the low bidder on the electrical subcontract. Trepte testified Paxson declined, but stated Paxson Electric would forgive a debt of about $100,000 owed to

Paxson Electric by Fischbach and Moore if Paxson was allowed to be the low bidder. Trepte testified that later Defendant Ewalt joined them in Paxson's hotel room; that no overall agreement was reached in Trepte's presence, but that Trepte was told as he was leaving that someone would be in touch with him regarding the bidding arrangement. Trepte testified that the next morning, he received a phone call. The caller stated the parties had reached an agreement, and that Fischbach's bid should be in a certain amount. Fischbach did bid that amount, and Paxson Electric was the successful bidder. The only other bidder was Dynalectric.

Trepte's testimony that Defendant Paxson Electric agreed to forgive a debt of about $100,000 in exchange for Fischbach's allowing Paxson Electric to have the Snapfinger job is supported by circumstantial evidence. After Paxson Electric got the job,[1] it never sought to collect a debt of $89,330.06 from Fischbach. This debt was on Paxson Electric's books as a receivable prior to the Snapfinger bids. Fischbach and Moore, Inc. is the largest electrical contracting firm in the United States. Further, the handwritten entries of Paxson Electric's vice-president, Robert Lassetter, on a sheet of lined yellow pad used to figure profits on the Snapfinger job include an entry of $89,330.06 as an apparent expense of the job.[2]

Although there was no direct evidence of what quid pro quo Paxson Electric offered Dynalectric, the evidence showed without dispute that Paxson Electric turned over one-half of the profits[3]

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[1] The job was nominally carried out by CCC Electric, Inc., a corporate affiliate of Paxson Electric, Inc. This was by agreement with the general contractor, which was seeking greater minority participation for the job. Defendant Paxson caused CCC Electric, Inc. to be formed between 1976 and 1978. 51% of the stock was owned collectively by Umberto Codispoti, a resident of Miami, and Joseph Calhoun, a resident of Atlanta. Mr. Codispoti is of Hispanic descent and Mr. Calhoun is black. The remainder of the stock was owned by persons affiliated with Paxson Electric Company. The electrical work on Snapfinger was supervised by Robert Lassetter, Paxson Electric's vice-president, who worked in CCC's Atlanta office while the job was in progress.

[2] The precise sum of $89,330.06 is written on one side of the sheet; the column of expense items reflects $90,000.00 as an expenditure.

[3] The total profits were 1.7 million. $880,000 was paid to Dynalectric Company.

on the Snapfinger job to Dynalectric. Dynalectric did no work on the Snapfinger project except for periodic site inspections by Dynalectric's Atlanta branch manager. Paxson Electric and Dynalectric's witnesses characterized the arrangement as a silent joint venture. They testified that neither Dynalectric nor Paxson Electric informed the general contractor or the project owner of the existence of the silent joint venture. Dynalectric's branch manager Philip Waagner testified that Defendant Ewalt told him not to broadcast its existence.

Bernard Trepte's direct testimony as to the conversations and events surrounding the bid-rigging was corroborated in part by two other witnesses. Edward Baylin, former Atlanta branch manager for Dynalectric, testified that Trepte had approached him in August, 1979, with an inquiry as to whether Dynalectric would be interested in fixing the Snapfinger bids. Baylin testified he referred Trepte to his supervisor, who stated he would let Defendant Ewalt, President of Dynalectric, know of the overture. William Kale, former employee of Commonwealth Electric, testified that in 1980, Robert Lassetter told him while discussing another proposed bid-rigging that the Snapfinger job had been rigged.

The Defendants' evidence, on the other hand, was as follows: Defendants Paxson and Ewalt denied that they had made any agreement with Trepte to rig the Snapfinger bid. Defendant Paxson testified that he had had dinner with Trepte on the evening before the bids were submitted, but testified that the Snapfinger project was not discussed and that their conversation concerned only Trepte's possible employment with Paxson Electric. Defendant Paxson denied having seen or having talked to Defendant Ewalt on September 6 or 7, 1979; Defendant Ewalt similarly denied having seen or having talked to Defendant Paxson. Defendants Paxson and Ewalt both testified that the joint venture arrangement was suggested by Defendant Ewalt only after Paxson had been named as the successful bidder. Defendant Paxson testified that he agreed to the joint venture because Dynalectric had a relationship with a minority-owned firm which might induce the general contractor to switch the electrical contracting work to Dynalectric. There was evidence that the general contractor was seeking to increase minority participation. Defendants Paxson and

Ewalt called character witnesses who testified that said Defendants are truthful persons.

There was undisputed evidence that the Snapfinger electrical work began in 1980, and continued through 1984. Paxson Electric/CCC shared profits with Dynalectric in incremental payments to Dynalectric over the course of the job. The final payment to Dynalectric was made on October 26, 1983, in the sum of $375,000. This represented Paxson's estimate of Dynalectric's share of the remaining profits. The final payment to CCC was made by the general contract on January 24, 1985.

In accordance with the foregoing, the court concludes that the verdict is not contrary to the weight of the evidence.

2. Admission of 404(b) Testimony

All Defendants argue that the court erred in admitting 404(b) evidence.

The following testimony was admitted at the conclusion of the government's case in chief under Rule 404(b), Federal Rules of Evidence.

William H. Kale, former regional manager for Commonwealth Electric, testified as follows: On June 13, 1980, he met with Robert Lassetter, vice-president of Paxson Electric Company to discuss the upcoming bidding on the South River Waste Water Treatment Plant. The meeting had been requested by Mr. Lassetter. Lassetter asked Kale whether Commonwealth would agree to assist CCC Electric, Inc., Paxson's corporate affiliate, to get the South River job by submitting a bid higher than CCC's. Lassetter stated that on a job called Snapfinger, Paxson had worked out a deal with Dynalectric wherein Dynalectric had been rewarded for their support during the course of the job. In early fall, 1980, Commonwealth made a corporate decision that it would no longer make pre-bid agreements with competitors; therefore, Commonwealth declined Paxson Electric's request for support.

Loran C. Eddington, former regional manager for E. C. Ernst, Inc., an electrical contracting firm, testified as follows: In the mid-1970's, he received a telephone call from Wesley Paxson pertaining to a paper mill job which was "in the million dollar

range." (TR. 984). Mr. Paxson requested that E. C. Ernst support Paxson Electric on that job. Paxson stated that Bill Primm of E. C. Ernst "owed him a million dollar obligation." (TR. 986). However, Mr. Primm had died six months or a year prior to that, and Eddington told Paxson he did not know of any obligation. Therefore, Ernst declined to support Paxson on the paper mill job.

Robert VanDivender, formerly vice-president of The Howard P. Foley Company, testified as follows: In the spring of 1982, he received a telephone call from Mr. Ewalt, with whom he was acquainted. Ewalt stated he wanted to talk to Benny Foley about the D. B. Wilson Project. This was several weeks prior to the bid date on D. B. Wilson. After speaking with Mr. Foley, VanDivender called Ewalt and told him to call Foley direct. He then heard back from Ewalt, who stated that Foley wanted Van Divender to attend a meeting regarding the project. The gist of the conversation was that Foley had agreed to support Dynalectric on the D. B. Wilson Project. Mr. VanDivender flew from Washington to LaGuardia Airport with Mr. Ewalt and Ewalt's associate Woodson Sosh. A meeting occurred in a meeting room at LaGuardia Airport on the same day, which was about a week before the D.B. Wilson bid date. Representatives of all the bidders for the electrical contracting work for the D. B. Wilson electric work were present: Lord Electric, Fischbach and Moore, and Comstock, in addition to Messrs Ewalt and Sosh on behalf of Dynalectric, and VanDivender on behalf of The Howard P. Foley Company. Mr. Ewalt presided. Cost estimates were discussed. Then Ewalt gave each of the attendees an approximate price to bid on the project. After the meeting, VanDivender, Ewalt and Sosh flew back to Washington together. The successful bidder on the D. B. Wilson Project was Dynalectric.

The subject of the 404(b) evidence is raised in two ways by Defendants. First, Defendants claim that the government failed to give them timely, proper notice of the Rule 404(b) material prior to trial, and secondly, Defendants contend that the court erred in any event in admitting it because of lack of relevance. Each of these contentions will be discussed in turn.

a. Notice Of The Rule 404(b) Evidence

The parties do not contend that the notice of Rule 404(b) evidence failed to comply with any statute or decision establishing notice requirements for proposed 404(b) evidence. Rather, they contend the government failed to comply with the court's order requiring that 404(b) evidence be turned over in advance of trial. At a pretrial hearing held on November 18, 1986, Magistrate Harper directed the government to turn over Rule 404(b) evidence within ten days. The Magistrate's order was no more specific than that, but in colloquy immediately preceding his order, the government had stated that it had no objection to turning over such 404(b) evidence as was then known to it, and stated that it proposed to "identify the project in question as specifically as we can and provide to them a list of those incidents of bad acts or other crimes."

On December 2, 1986, the government sent a letter to counsel for all Defendants, identifying the following Rule 404(b) evidence:

> With respect to Defendant Wesley C. Paxson, Sr.: Evidence that the defendant reached an agreement to rig bids on a paper mill project to be performed in North Florida or South Georgia with, among others, a representative of E. C. Ernst, Inc. (1970s).
>
> With respect to Defendant G. W. Walther Ewalt: Evidence that the defendant engaged in pre-bid communications with competitors for the purpose of reaching agreements to rig bids for electrical construction work to be performed on(1) the D. B. Wilson Generating Station in Kentucky (1982)....

With respect to defendants Paxson Electric Company and Dynalectric Company: The same evidence noted above with respect to defendants Paxson and Ewalt....

Paxson Electric's counsel discussed this information with government counsel in telephone calls which occurred on December 9 and 16, 1986. At that time, government counsel further described the paper mill bid-rigging as follows:

> A government witness would testify that Mr. Paxson telephoned him, described a bid-rigging deal Mr. Paxson allegedly had made with William Primm of E. C. Ernst, Inc., and requested the witness' support on an unidentified paper mill project in south Georgia or north Florida. This call took place within one or two years after Mr. Primm's death in approximately 1973. The Harold B. Foley Company was also bidding on this unidentified project, which was worth over one million dollars.

Paxson's counsel asked that the identity of the witness be disclosed, and government counsel refused.

On March 11, 1987, government counsel wrote a letter to all defense counsel concerning various evidentiary matters in connection with the upcoming trial. The letter included this paragraph concerning Rule 404(b) evidence:

> Fourth, I wish to advise you that the United States may offer additional (*see* letter of December 2, 1986) Rule 404(b) evidence against defendant Paxson Electric Company related to pre-bid communications concerning the South River Waste Water Treatment Plant, DeKalb County, Georgia (1980).

The trial commenced on March 23, 1987.

The government argues first that the December 2 letter was timely. It contends that once intervening weekends and Thanksgiving Day are excluded from the computation of the number of days between November 18, 1986 and December 2, 1987, that the government met the Magistrate's ten day notice requirement. Regardless of whether this is the correct approach, the court finds that the Defendants were not prejudiced.

The court further finds that the government's description of the Rule 404(b) evidence given by Mr. Eddington with respect to the paper mill job in the mid-1970's is sufficient to comply with the Magistrate's order. It also is specific enough to permit the Defendants to investigate, particularly given the absence of proof from Defendant Paxson Electric Company that the jobs bid by Paxson

which might fall under the description provided were so numerous as to make a reasonable investigation impractical.

With respect to the testimony given by William Kale, the government admits that it had Kale's testimony prior to December 2, 1986. However, the government claims that it initially viewed Kale's testimony concerning the South River Project not to have been Rule 404(b) material, but rather explanatory background which would give credibility to Kale's testimony that Lassetter said the Snapfinger bid was rigged. Later the government determined this evidence might be viewed as 404(b) evidence. Although the court believes that the testimony relative to South River is better construed as 404(b) testimony, it nonetheless finds that this is a close question and the government's position was taken in good faith. Further, Defendant Paxson Electric was not prejudiced, because some pretrial notice was still given. Also, the only other party to the claimed conversation was Robert Lassetter, representative of Paxson Electric who was present throughout the trial as Paxson Electric's corporate representative. Mr. Lassetter did testify. He admitted meeting with Kale but denied having made the statements attributed to him by Kale. Paxson Electric has failed to specify what investigative avenues it might have pursued had it had more notice.

b. Admissibility Of The Rule 404(b) Evidence

Defendants contend that the court erred in admitting the referenced items of 404(b) evidence, claiming that they were not relevant to any issue in the case. While Defendants appear to concede that Rule 404(b) evidence can be admissible to prove intent, *see United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980); *United States v. Kopituk*, 690 F.2d 1289, 1335 (llth Cir. 1982), they contend that such evidence was not properly admitted because the Defendants offered to stipulate intent. Specifically, the Defendants offered[4] the following stipulation during the trial:

> If the jury finds that the Defendants met and agreed to fix bids as alleged, intent to restrain trade shall be presumed.

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[4] The government did not agree to the stipulation.

Assuming that a proffered stipulation may cut off the government's right to introduce Rule 404(b), any such stipulation must unequivocally remove the issue of intent from the case. *See United States v. Williford*, 764 F.2d 1493, 1497-98 (llth Cir. 1985). In this case, Defendants proffered stipulation did not unequivocally remove intent as an issue. The Defendants' stipulation was addressed to the element of restraint of competition, not the question whether Defendants knowingly (that is, intentionally, and not through mistake or accident) made an agreement to rig the Snapfinger bids. In a bid-rigging case, the government is not required to submit evidence that the defendants intended to restrain trade. The government need only prove that the parties knowingly entered into an agreement to fix the bids. In this case, the government's evidence indicated that in bid-rigging conspiracies generally, and in the instant case, any discussions had by the claimed bid-riggers are couched in terms of, *e.g.*, a request for "support" on a job; a request for a "complementary bid." The Rule 404(b) evidence aided the government in persuading the jury that any discussions of possible "support" on Snapfinger were calculated to fix the bids, not requests for some other type of assistance on the project. The fact that the Defendants did not advance this argument is irrelevant; the government still had the burden of proof, not merely to show that the Defendants had met and talked about the project, but that there was a common understanding that the bids would be fixed.

3. Claim That Brady And Jencks Material Was Not Properly Provided

The motion filed by Defendants Paxson and Paxson Electric urges that the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution required to turn over evidence favorable to defendant on request) and the Jencks Act, 18 U.S.C. § 3500(b) (government required to produce statements of a witness who has testified on direct examination which "relate[s] to the subject matter as to which the witness has testified.") The Paxson defendants contend that *Brady* and Jencks were violated because the government only turned over the grand jury testimony of its witness Bernard Trepte which pertained to the Snapfinger Project, and did not turn over Trepte's grand jury testimony pertaining to

bid-rigging on other projects.[5] Also, the government did not turn over counsel's own notes taken during Trepte's interviews pertaining to Snapfinger.

Trepte's testimony at trial only pertained to claimed bid-rigging on the Snapfinger Project. He admitted he had engaged in bid-rigging on other projects, but none of these other projects were the subject of his testimony. Also, government counsel stated that their notes were not substantially verbatim recitals of Trepte's oral statements, and were not signed or adopted by him. (*See Campbell v. United States*, 387 U.S. 487 (1963); *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974)). Accordingly, there was no violation of the Jencks Act.

With respect to the claimed *Brady* violation, the Defendants' position appears to be that if Trepte's testimony concerning bid-rigging on other projects were turned over, that it might be a fruitful source for development of impeaching information. For example, if he testified that certain events transpired in connection with the fixing of a bid on another project, the Defendants might be able to offer contrary information and thereby challenge Trepte's credibility generally. However, this is not within the purview of *Brady*. *Brady* is directed to material which the prosecutor knows is helpful and material to the Defendant. Defendants have offered no authority to support the broad interpretation of *Brady* they implicitly posit, and the court knows of none.

4. Admission Of Co-Conspirator's Statements Under Rule 801(d)(2)(E), Federal Rules of Evidence

Defendants Dynalectric and Ewalt argue that the court erred in admitting Bernard Trepte's testimony concerning a telephone call he received on the morning of September 7, 1979. He stated the caller said the "parties" had reached an agreement and that Fischbach and Moore's bid should be in a certain amount. He could not identify the caller. The government contends this evidence is admissible under Rule 801 (d)(2)(E), Federal Rules of Evidence,

[5] Trepte has testified before numerous grand juries in various Districts.

but Defendants Dynalectric and Ewalt contend there was insufficient independent evidence linking Defendants Ewalt and Dynalectric to the conspiracy in order to permit the telephone call evidence to be admitted against them. *See United States v. Alvarez*, 755 F.2d 830, 855 (llth Cir.), *cert. denied, sub nom. Hernandez v. United States*, 106 S.Ct. 274 (1985).

No witness gave direct testimony that Ewalt agreed to fix the bids on Snapfinger. Rather, the government's witness Trepte testified that on the evening of September 6, he discussed fixing the bids with Defendant Paxson; that thereafter he met with Defendant Paxson and Defendant Ewalt in Paxson's hotel room. Trepte's testimony concerning the portion of the meeting he attended was as follows:

> Well, it was sort of--sort of quick. We, Mr. Paxson and I, were waiting for Mr. Ewalt to arrive. He did. We discussed the project. We discussed the size of the job. Each of us had an idea of the number of man-hours and dollars of material that were involved in our own estimates, and we put the proposition on the table that Dynalectric and Paxson would support Fischbach and Moore, and that was rejected. I then said that I would give Mr. Paxson my support if Ewalt and Paxson could work out a suitable arrangement between themselves. At that point in time, I left the meeting. (TR. 167).

The record contains sufficient independent evidence of Mr. Ewalt's and Dynalectric's membership in the claimed conspiracy to allow the evidence of the phone calls to be admitted. First, Trepte's referenced testimony is evidence that Ewalt participated in a discussion of possibly rigging the Snapfinger bids. Second, the evidence showed that after the electrical contract was awarded to Paxson, Paxson turned over one-half of its profits on Snapfinger to Dynalectric. Dynalectric did no work on the Snapfinger project. It only sent its Atlanta branch manager, Philip Waagner, to view the site occasionally, and to discuss the job's progress with Robert Lassetter, who was overseeing the work for Paxson/CCC Electric, Inc.

Edward Baylin, manager of Dynalectric's Atlanta office during 1979 and until September, 1980, testified that in the summer of 1979 Bernard Trepte asked whether Dynalectric would be interested in working something out on the Snapfinger job. Baylin mentioned this to his supervisor, Woodson Sosh, who stated he would pass the inquiry along to Defendant Ewalt. Baylin heard nothing back from Sosh or Ewalt concerning this matter, but proceeded to prepare cost estimates for bidding the Snapfinger project. Specifically, he made an estimate for materials and labor. On bid day, (September 7), Woodson Sosh, Defendant Ewalt and another Dynalectric representative came to Dynalectric's Atlanta office. They went into a closed-door conference and when they emerged, Ewalt told Baylin that Dynalectric's bid would be 5.3 million. Baylin thought this was high. At that time, Dynalectric's Atlanta office needed work. However, he submitted this as Dynalectric's bid. No one ever told Baylin that a joint venture had been formed with Paxson, even though Baylin remained as Dynalectric's branch manager until the fall of 1980.

Dynalectric's witness Philip Waagner, who became branch manager of the Atlanta office in 1981, testified that Defendant Ewalt told him about the joint venture, but told him not to broadcast its existence.

The court finds that the foregoing evidence constitutes substantial evidence of the membership of Defendants Ewalt and Dynalectric in the alleged conspiracy, and further finds that the evidence as a whole preponderates in favor of the government's theory that said Defendants were members of a conspiracy. *See United States v. Roper*, 681 F.2d 1354, 1359 (llth Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *United States v. Lopez*, 758 F.2d 1517, 1520 (llth Cir. 1985).

5. Claim of Juror Misconduct

Defendants contend that a new trial should be granted because of juror misconduct. They contend that one of the jurors, Mrs. Beverly Noe, brought some handwritten notes into the jury room which contained certain legal principles or definitions, which she read to the jury during its deliberations. Defendants contend that this warrants the grant of a new trial, unless the government

can demonstrate that there is "no reasonable possibility" that the Defendants were prejudiced. *United States v. Coporale* [sic], 806 F.2d 1487, 1503 (llth Cir. 1986). The court finds there is no reasonable possibility that Defendants were prejudiced, and accordingly rejects this argument.

Defendants' motion for new trial attaches affidavits of jurors Noe, Edwards, Jones and Graeff. The four juror affidavits confirm that juror Noe did in fact bring certain handwritten notes with her to the jury room on the morning of Friday, April 17, 1987, although no two affidavits agree as to what Mrs. Noe read to the jury.

The court held an evidentiary hearing on Thursday, May 28, 1987, at which all jurors appeared and testified under oath. The relevant facts, as determined by the court from their testimony and the trial record are as follows:

The jury began its deliberations on the morning of Wednesday, April 15, 1987. By Thursday afternoon, April 16, the jury had taken a preliminary vote; eight persons were for conviction and four against. The jury's disagreement focussed on what evidence was circumstantial, and how much weight to give to the circumstantial evidence. As the jurors departed on Thursday afternoon, they sent a note to the court, stating as follows:

> We need a clear definition of circumstantial evidence. Also how to apply it. We need to have restated reasonable doubt.
>
> /s/ Rodney E. Gallman

The jury reported to resume its deliberations on Friday morning, April 17, at 9:00 a.m. During the period when the jury was waiting to hear the court's recharge on the law, juror Beverly Noe stated that she had spent a great deal of time during the night thinking about the case. She had looked at some old notes from a law course taken as part of graduate work in health administration. Mrs. Noe had jotted some notes in the margins of a small commercial flier or card which she had been using as a bookmark. She proceeded to read these notes out loud.

The court concludes that Mrs. Noe herself does not know precisely what she said to the members of the jury. Immediately

after the trial, she discarded her "bookmark" and also her old law course notes. The affidavit she prepared for defense counsel was made without the benefit of her bookmark or her notes. Mrs. Noe's affidavit, and also her testimony at the May 28 hearing, was to the effect that she read these phrases to the jury: "Innocent until proven guilty," "all evidence and testimony is presumed truthful until proven otherwise," "in dealing with conflicting evidence merely decide which has the greatest probability of being true or simply, what is the most reasonable and sensible." Mrs. Noe denies having provided the jurors with definitions of reasonable doubt or circumstantial evidence. She states that she never intended to supply legal definitions, but rather merely wanted to share her thoughts concerning helpful approaches to the decisional process with her fellow jurors. The court accepts juror Noe's testimony that she did not intend to offer any material as a substitute for the court's charge.

However, almost all of the jurors who testified at the May 28 hearing agreed that the perceived subject of Mrs. Noe's remarks was the term "circumstantial evidence." The court accepts their testimony. No one, except for juror Bonner, could remember any part of what joror [sic] Noe said concerning circumstantial evidence. Juror Bonner could only recall that she had said "that it could be used, that it was evidence--it was a kind of evidence...." Jurors Edwards and Graeff, whose testimony is also credited by the court, stated that Mrs. Noe's comments concerning circumstantial evidence were along the same lines as the court's subsequent recharge with respect to that term.

Although only a few jurors testified that Mrs. Noe made any statement concerning "reasonable doubt," the court finds that she did. Jurors Bonner and Graeff testified that she did, and juror Edwards testified that he thought she might have. The other jurors did not deny that Mrs. Noe had made a statement regarding the concept of "reasonable doubt," but simply could not remember. Juror Edwards could not recall exactly what Mrs. Noe had said on this subject, but testified that her statement was similar to the court's recharge; juror Bonner could remember that Mrs. Noe had said that beyond a reasonable doubt "didn't necessarily mean 100%

sure." Juror Graeff testified credibly that Mrs. Noe had stated that a reasonable doubt was a "real doubt."

The court further finds, after hearing the evidence, that Mrs. Noe's comments also included reference to phrases similar to those identified in her affidavit, but which were likely not word for word the same. These phrases made little impression on the jury.

At approximately 9:35 a.m., the jury was brought into the courtroom and given a recharge, as follows:

> Ladies and Gentlemen, thank you for your note. You have asked the court to define circumstantial evidence, and you have also asked for me to give the charge on reasonable doubt again, and so I am going to answer both of those questions now.
>
> I charged you that while you may consider only the evidence admitted, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.
>
> You may consider either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact such as an eyewitness.
>
> Circumstantial evidence is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law requires only that you weigh all of the evidence and be convinced of a defendant's guilt beyond a reasonable doubt before he or it can be convicted.
>
> Then with respect to the charge on reasonable doubt, I charge you that the defendants are presumed by law to be innocent unless and until proven guilty. The law does not require a defendant to prove his innocence or, in fact, to produce any evidence at all.

The government has the burden of proving the defendants guilty beyond a reasonable doubt, and if it fails to do that, you must acquit the defendants.

Now, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's evidence exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is a real doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If you are convinced that the defendants have been proven guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Ladies and Gentlemen, I believe that responds to the specific inquiries that you made. If you all would like any further instruction or particular legal principles, I will be glad to give it to you. For example, if you would like for me to go over with you again each element of the offenses charged, I will be glad to do that. So, you all let me know if you have further questions.

Following the recharge, the jury retired and resumed its deliberations. According to the testimony of the jury foreman, Mr. Gallman, which is credited by the court, the jury then spent some 45 minutes discussing the court's recharge. Another vote was taken, at which time eleven jurors voted for a conviction. Juror Edwards did not vote for conviction until late Friday afternoon. The jury returned its verdict late Friday afternoon. In the time frame following the court's recharge, Mrs. Noe did not read from her bookmark again. None of the jurors referred to Mrs. Noe's previous comments. All of the jurors who had heard Mrs. Noe's

comments that morning testified, credibly, that they based their verdict on the court's charge.[6]

Based on the foregoing findings of fact, the court concludes that there is no reasonable possibility that the Defendants were prejudiced by the extrinsic information which Mrs. Noe brought to the jury room. The focus of the jury's concern when Mrs. Noe gave her unsolicited remarks was what constituted circumstantial evidence and how much weight the jury should properly give to it. Thus, Mrs. Noe's comments were perceived by the jury as pertaining to that subject. The definitions or descriptions of circumstantial evidence and reasonable doubt which she stated were similar to the definitions contained in the court's charge. The other phrases she stated were not necessarily accurate statements of the law, but were not prejudicial when considered in conjunction with the definitions of circumstantial evidence and reasonable doubt. The time frame during which Mrs. Noe's possibly inaccurate or incomplete definitions or phrases were before the jury was very short, and the jury took no action during that time. The court gave a complete and accurate recharge on the terms circumstantial evidence and reasonable doubt within 30 minutes of Mrs. Noe's comments. It was only after discussion of the court's charge, during which time Mrs. Noe's previous statements were not mentioned, that the jury took a further vote. Finally, the definition of the term "circumstantial evidence" as given by the court in its charge and recharge, is an inclusive, rather than exclusive definition. It is to the effect that circumstantial evidence is generally that evidence which is not of a direct nature, but which nonetheless bears in some way on the guilt or innocence of the defendants. The approved charge, given by the court, also makes it clear that circumstantial evidence is not relegated to a lesser status than direct evidence. Therefore, it is very unlikely that any remarks Mrs. Noe may have made on this subject had the effect of encouraging greater reliance on circumstantial evidence than the jury was entitled to give it. Finally, each of the jurors who heard Mrs. Noe's comments tes-

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[6] The jury foreman, Mr. Gallman, testified credibly that when Mrs. Noe was speaking, he was looking at a document and was not paying attention to what she said.

tified that they nonetheless returned a verdict based on the court's charge on the law.

6. Claim That Court Gave Incorrect and Prejudicial Instructions of Law to the Jury

Defendants Dynalectric and Ewalt contend that the court committed prejudicial error by refusing to give instructions concerning the subject of joint ventures or silent joint ventures, the gist of which was that these arrangements are lawful. These charge requests, while accurate in part, were not applicable under the evidence. The indictment, the government's arguments and its witnesses made it clear that Defendants were charged with agreeing to fix the Snapfinger bids. The alleged bid rig agreement included a kickback of 50% of the profits to Dynalectric. The Defendants contend that although Dynalectric received 50% of the profits, this was pursuant to a silent joint venture which was established *after* Paxson legitimately was the successful low bidder. The court charged the jury that in order to convict the Defendants on Count One (the Sherman Act count) the jury would have to find beyond a reasonable doubt that a bid rig agreement as charged in the indictment was made before the bids were submitted on Snapfinger. Given that instruction, it would have been superfluous and confusing to charge the jury concerning the legitimacy of joint ventures generally.

7. Claim That The Prosecutor Made Prejudicial Misstatements Of Fact In His Closing Argument

Defendants Dynalectric and Ewalt contend that the prosecutor made certain misstatements in his closing argument and that the Defendants were prejudiced to such an extent that a new trial is warranted. Specifically, these Defendants complain of the following statements made by the prosecutor in his closing argument: "The first time the Department of Justice knew anything about the Snapfinger Creek bid-rigging conspiracy was when he [Trepte] was testifying about it in Washington." TR 3198. "There is no evidence in this case that [Trepte] was shown any records relating to where Wally Ewalt stayed..." or "relating to where Wes Paxson stayed. The only records Mr. Trepte was shown

were records of Fischbach and Moore related to phone calls and his own expense vouchers...." TR 3302. They also complain of the prosecutor's statement as follows:

> In conclusion, I want to just comment on this final point with respect to the suggestion, although taken back by Mr. Bondurant, that somehow the federal government or federal prosecutors have some incentive to juice up testimony and bring evidence against innocent individuals. As a person I resent the accusation although withdrawn. I suggest to you that is an act of desperation by these defendants... I resent the implication by these defendants that there is any impropriety in dealing with Bernard Trepte. There was no evidence in this case that he was shown any records relating to where Wally Ewalt stayed or that Wally Ewalt was making any phone calls... There is no evidence that he was shown these records. There was no evidence to show he was shown any records relating to where Wesley Paxson stayed. The only records Mr. Trepte was shown were records of Fischbach and Moore related to phone calls and his own expense vouchers, and I resent the implication... I submit to you that on the evidence in this case the defendants are guilty as charged, and I urge that you return an appropriate verdict.

The record—certainly the record before the jury—does not clearly establish one way or the other whether the prosecutor's factual representations were correct. To the extent that Dynalectric and Ewalt claim that his remarks were not based on the record, and were improper because they invoked the personal view of the prosecutor, their objections are well taken. However, the prosecutor's remarks were not prejudicial.

During the trial Defendants brought out several respects in which witness Trepte had changed his testimony. First, Trepte had initially told government counsel that the bid-rigging meeting occurred in Defendant Ewalt's hotel room; subsequently he testified it was in Defendant Paxson's room. The evidence at trial showed without dispute that on the evening when the meeting

allegedly took place, Ewalt was staying at the airport Hilton and Paxson was staying at the downtown Hilton. Secondly, Trepte initially told government counsel that he had picked Defendant Paxson up at the airport on September 6; he later retracted this testimony. Third, Trepte's first account failed to mention that he and Paxson had gone by Ewalt's hotel room prior to dinner, but that Ewalt was busy and told them he would meet them later. Later Trepte testified to this effect. The Defendants legitimately sought to highlight these changes as being indications that Trepte's recollection of the September 6-7 events was generally faulty. However, in the process they also sought to develop the theme that government counsel had acted unethically by showing documents to Trepte, *e.g.*, hotel expense records, which suggested that the referenced statements he had made initially were not correct. The latter tactic of defense counsel was not proper. Neither was it proper for Defendants to suggest that it was irregular or suspicious that Justice Department attorneys had interviewed Trepte "privately." Thus, the prosecutor's remarks in his closing argument responded to the innuendo of defense counsel. His comments were improper for the reasons stated, but they were not prejudicial. The fact that Trepte had changed his account as noted was not disputed. The Defendants, not the prosecutor, were on trial.

B. MOTIONS FOR JUDGMENT OF ACQUITTAL

1. Kastigar Issue

Defendant Wesley Paxson, Sr. moves for judgment of acquittal or alternatively for a new trial on the ground that the indictment and the government's evidence at trial were impermissibly derived from his immunized grand jury testimony. This issue has been addressed previously in the Magistrate's Report and Recommendation dated January 21, 1987, and the court's order of March 12, 1987.

Defendant Paxson appeared before a federal grand jury in the District of Columbia on September 28, 1984. He invoked his Fifth Amendment privilege. He was granted use immunity and then testified. The grand jury was investigating bid-rigging in the electrical construction field generally.

Prior to Mr. Paxson's testimony, the government had heard witness testimony and had obtained documentary evidence which suggested that the electrical bids on Snapfinger had been rigged. For example, former Dynalectric employees James Knight and Edward Baylin testified in 1982 that they suspected the Snapfinger job was rigged, based on the extent to which Dynalectric's bid exceeded their expectation of what a proper bid would have been. However, the government had no direct evidence in the sense that no witness had testified that he had been present at a bid-rigging discussion among competitors on that job.

When he appeared before the grand jury in 1984, Mr. Paxson was asked specifically about the Snapfinger bids. He stated he had nothing to do with the bidding of that job. He testified that Robert Lassetter, Paxson Electric vice-president, had set Paxson Electric's bid price and handled the bid process on Snapfinger. Paxson stated he had negotiated a joint venture with Dynalectric after Paxson Electric was announced as low bidder. He testified that to his knowledge, Paxson Electric Company had never paid or received anything of value for bid-rigging. He stated he had never engaged in bid-rigging in his career.

After Paxson's testimony in September, 1984, no further witnesses were called and no documents were subpoenaed relative to Snapfinger until October of 1985. At that time, the grand jury subpoenaed Bernard A. Trepte. He invoked his Fifth Amend ment privilege, and was granted use immunity. On October 31, 1985, Trepte testified that he met with Wesley Paxson in Atlanta on the evening before the Snapfinger bid. He testified that he and Paxson discussed the job, and that he had agreed that Fischbach and Moore would support Paxson if Paxson would forgive a debt of approximately $100,000 owed to it by Fischbach and Moore. He testified that Defendant Ewalt joined him and Paxson, but that he departed the meeting before any arrangement had been worked out between Paxson and Ewalt. He testified that the next morning he received a telephone call from someone who stated that the parties had reached agreement, and that Fischbach's bid should be in a certain amount.

The government presented evidence to a grand jury in the Northern District of Georgia on September 17-19, 1986. No reference was made to the immunized testimony of Paxson. Mr. Paxson was indicted along with Defendants Dynalectric, Fischbach and Moore, and Paxson Electric Company, on September 19, 1986.

Where the government proceeds against a previously immunized witness, it has the burden of proving that it has made no direct or indirect use of the witness's immunized testimony. *Kastigar v. United States*, 406 U.S. 441 (1972). The government urges it has met its burden. The government relies on a detailed, 65 page affidavit of lead counsel Hayes Gorey, Jr., plus 50 exhibits appended thereto. This affidavit was originally filed under seal on December 10, 1986; the affidavit was ordered unsealed by the court after the jury verdict was received. Additionally, a supplemental affidavit of Hayes Gorey, Jr. was filed May 20, 1987. The government further relies on the substance of the trial testimony and immunized testimony themselves to demonstrate that there has been no direct or indirect use of the immunized testimony.

The government's evidence against Defendant Paxson at trial was 180 degrees counter to that reflected in Mr. Paxson's immunized testimony. That there has been no direct evidentiary use of any facts or information revealed by Mr. Paxson could not be clearer.

Defendant Paxson contends that the government has not made a sufficient showing that none of its trial evidence was derived *indirectly* from Paxson's immunized testimony. He suggests the possibility that government counsel's knowledge of the substance of Paxson's immunized testimony was helpful in preparing for trial. Pretermitting the question whether nonevidentiary uses are properly the subject of a *Kastigar* violation, *see, United States v. Byrd,* 765 F.2d 1524, 1531 (llth Cir. 1985) (*Kastigar* limited to evidentiary uses), the court finds that the government has made a sufficient showing in any event that there was no indirect use of Mr. Paxson's testimony. In so finding, the court relies on the detailed proof submitted by the government in Mr. Gorey's affidavits, plus the fact that Mr. Paxson's immunized testimony was

the opposite of the evidence given by the government's witnesses at trial.

Defendant Paxson argues that under *United States v. Hampton*, 775 F.2d 1479 (llth Cir. 1985), the fact that Paxson's testimony was exculpatory is legally irrelevant to a *Kastigar* analysis. In *Hampton*, the Court noted: "The fact that Hampton's immunized testimony did not contain an admission of guilt or of knowledge that the transactions in which he was involved were tied in with a drug smuggling operation does not establish that his immunized statements were without value in the federal investigation...." *Id.* at 1487, n.39. However, Defendant Paxson misinterprets *Hampton*. Hampton's immunized testimony, unlike that of Paxson, was not exculpatory. Hampton's immunized testimony did not contradict the government's subsequent evidence that he had conspired to import, possess and distribute marijuana. Rather, Hampton's immunized testimony concerned his part in arranging for certain property transfers, plus testimony that he had owned a dwelling where certain marijuana residue was discovered. Thus, Hampton's immunized testimony and that of Defendant Paxson in the instant case are not properly compared. Had Defendant Paxson's immunized testimony been accepted by the government, it would have been a dead end for the Snapfinger investigation. Since his immunized testimony is directly at odds with the testimony of the government's witnesses at trial, it is logical to infer that one did not lead to the other. This inference, plus the detailed information furnished by Mr. Gorey's affidavit, lead the the [sic] court to find that the government has sustained its burden of proving by a preponderance of the evidence that its evidence was derived from independent sources and that Paxson's immunized testimony was not used, either directly or indirectly against him. *See United States v. Byrd*, 765 F.2d 1524, 1529 (llth Cir. 1985).

2. Mail Fraud Counts

All Defendants renew their motions for judgment of acquittal on counts two and three of the indictment, the mail fraud counts. At the close of the government's case, a motion was made to dismiss the mail fraud counts and the court denied said motion.

The indictment alleges that by rigging the electrical subcontract on the Snapfinger Creek Project, Defendants engaged in a scheme to defraud DeKalb County and the United States through its agency, the Environmental Protection Agency ("EPA"), of money and the right to competitive bidding. The indictment further alleged that Defendants caused the use of the mails for the purpose of executing this scheme to defraud.

Defendants initially argue that the government has failed to prove a scheme to defraud DeKalb County and the EPA of money because there has been no showing that a higher contract price was passed on to DeKalb County and the EPA from the George Hyman Company, the general contractor, as a result of a rigged electrical subcontract bid.

Bid-rigging on a publicly funded construction project has been characterized as a scheme to defraud of money because it defrauds the victims of the "monetary advantage of competitive bidding." *United States v. Washita Construction Company*, 789 F.2d 809, 818 (10th Cir. 1986). Accordingly, it is not necessary to establish that a higher price on the general contract was passed on to DeKalb County and the EPA as a result of the rigged electrical subcontract bid.

Defendants further argue that in order to establish a scheme to defraud based on the deprivation of the intangible interest in free and competitive bidding, a fiduciary relationship must exist between Defendants and the victims of the scheme. However, the former Fifth Circuit has not required the existence of a fiduciary relationship in order to find a scheme to defraud the government of its interest in open bidding through a bid-rigging conspiracy. *United States v. Rodgers*, 624 F.2d 1303, 1310 (5th Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). In *Rodgers*, the mail fraud scheme arising from rigged bids "defrauded the government of its right to depend upon the competitive process to allocate the jobs and to set the cost of those jobs." No fiduciary relationship was necessary to establish a scheme to defraud the government. Thus, Defendants' argument on this point is without merit.

Defendants Dynalectric and Walther Ewalt argue that the use of the mails has not been shown to be sufficiently related to

the scheme to defraud. In this case, two checks were mailed from the George Hyman Company to CCC Electric as payment on the electrical subcontract. Use of the mails for payment on the rigged bid has been found to constitute using the mails in furtherance of the scheme to defraud since the "scheme would have been meaningless, incomplete and futile without final award and payment which were accomplished through the mail." *Rodgers, supra*, at 1310. Thus, Defendants' argument that mailing payments from the George Hyman Company to CCC Electric is not sufficiently "integral" or "incident to an essential part of the scheme" is unpersuasive. *United States v. Caldwell*, 776 F.2d 989, 1004-1005 (llth Cir.1985).

Defendants Dynalectric and Ewalt's argument for acquittal on the grounds that they withdrew from the scheme before the checks were mailed is similarly unpersuasive. Final settlement of the joint venture prior to the date the checks were mailed from the George Hyman Company to CCC cannot be construed as the requisite affirmative action to show that these Defendants abandoned the scheme to defraud. *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 (1978).

In light of the above, Defendants' motion for acquittal on counts two and three is denied.

3. Claim Of Prejudicial Delay

Defendants Dynalectric and Ewalt argue that the government's delay in bringing the indictment deprived Defendants of their due process rights. They specify a variety of instances at trial when Defendants Ewalt and Paxson, as well as other witnesses, were unable to recall certain events in 1979. Various details corroborating Defendants Dynalectric and Ewalt's story are claimed to have been unavailable as a result.

For preindictment delay to violate a defendant's due process rights, the delay must have caused actual prejudice to the defendant's conduct of his defense and the delay must have been caused by the government's deliberate action to gain a tactical advantage. *United States v. Butler,* 792 F.2d 1528, 1533 (11th Cir. 1986). As the "loss of memory occasioned by the passage of time does not constitute proof" of substantial or actual prejudice, *United*

States v. Warren, 772 F. 2d 827, 836 (11th Cir. 1985), Defendants have not met the first element of unconstitutional delay. With respect to the second element, there has been no showing that the government used the delay as a means to gain tactical advantage. Investigative delay itself does not constitute unconstitutional delay since prosecutors are not obliged to "file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *United States v. Reme*, 738 F. 2d 1156, 1163 (11th Cir. 1984), *quoting United States v. Lovasco*, 431 U.S. 783, 791 (1977). Thus, as Defendants have failed to meet either element in establishing unconstitutional delay, Defendants' motion for acquittal on these grounds is denied.

SO ORDERED, this 10 day of June, 1987.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Apppendix F
Judgments of the United States District Court

UNITED STATES OF AMERICA	UNITED STATES DISTRICT COURT FOR
V.	THE NORTHERN DISTRICT OF GEORGIA
WESLEY C. PAXSON, SR.	CR86-350A

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government

The defendant appeared in person on this date. June 2, 1987

With counsel: Emmet Bondurant and Bruce Kirwan

There being a verdict of guilty;

Defendant has been convicted as charged of the offense[s] of conspiring to restrain interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in count one of the indictment, and devising a scheme and artifice to defraud the United States of America, through its agency, the Environmental Protection Agency, in violation of Title 18, United States Code, Section 1341, as charged in counts two and three of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on count one, to serve SIX (6) MONTHS, balance of sentence suspended and the defendant is placed on probation for the balance on the condition that he pay a fine in the amount of $100,000.00 and that he perform community service as prescribed by the U.S. Probation Officer and approved by the Court. IT IS FURTHER ORDERED that the defendant pay a fine in the amount of 1,000.00 as to count two and

$25,000.00 as to count three. IT IS FURTHER ORDERED that defendant shall be allowed THIRTY (30) DAYS to pay the fines in counts one, two and three. IT IS FURTHER ORDERED that the defendant be allowed to voluntarily surrender to the Institution as directed by the U.S. Marshal.

The Court orders commitment to the custody of the Attorney General and recommends the Attorney General designate the Federal Prison Camp at Maxwell Air Force Base, Montgomery, Alabama, as the place of the imprisonment portion of this sentence.

Signed by:

U.S. District Judge

/s/ ORINDA D. EVANS

Date June 10, 1987

UNITED STATES OF AMERICA	UNITED STATES DISTRICT COURT FOR
V.	THE NORTHERN DISTRICT OF GEORGIA
PAXSON ELECTRIC COMPANY	CR86-350A

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government

The defendant appeared in person on this date. June 2, 1987

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The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted and ordered that the defendant shall pay a fine in the amount of $850,000 as to count one, $1,000.00 as to count two, and $100,000.00 as to count three and shall be allowed THIRTY (30) DAYS to pay the fine.

Signed by:

U.S. District Judge

/s/ ORINDA D. EVANS

Date June 10, 1987

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1325 and 88-1328

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAXSON ELECTRIC COMPANY AND
WESLEY C. PAXSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

DYNALECTRIC COMPANY AND
G.W. WALTHER EWALT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a bid-rigging, profit-splitting conspiracy continues for purposes of the criminal statute of limitations until the conspirators receive their anticipated profits and payoffs on the rigged contract (Nos. 88-1325 and 88-1328).

2. Whether petitioners were properly convicted of mail fraud where the indictment charged that they deprived their victims of "money" and the jury was instructed that it must find that the victims were deprived of "money" in order to convict (No. 88-1325).

3. Whether it was an abuse of discretion for the district court to deny an evidentiary hearing on a claim that immunized testimony was improperly used by the government, where the district court found that the government made a detailed, thorough, and complete showing that it had not made any improper use of such testimony, and the objecting witness failed to demonstrate that an evidentiary hearing would adduce any information to rebut that showing (No. 88-1325).

4. Whether the district court abused its discretion in refusing to give certain proposed jury instructions (No. 88-1328).

5. Whether the district court abused its discretion in refusing to admit certain evidence that it found to be irrelevant (No. 88-1328).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1325

PAXSON ELECTRIC COMPANY AND
WESLEY C. PAXSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-1328

DYNALECTRIC COMPANY AND
G.W. WALTHER EWALT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (88-1325 Pet. App. 1a-42a)[1] is reported at 859 F.2d 1559. The opinions of the district court (Pet. App. 44a-80a) are not reported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 88-1325.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. Petitions for rehearing were denied on January 4, 1989. The petition for a writ of certiorari in No. 88-1325 was filed on February 8, 1989. The petition for a writ of certiorari in No. 88-1328 was filed on February 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were convicted on one count of conspiracy to restrain interstate trade, in violation of the Sherman Act, 15 U.S.C. 1, and on two counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Wesley Paxson was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $126,000. Petitioner Paxson Electric Co. was fined a total of $951,000. Petitioner Dynalectric Company was fined a total of $1,501,000. Petitioner Ewalt was sentenced to six months in prison, to be followed by 18 months' probation, and was fined a total of $26,000. The court of appeals affirmed. Pet. App. 1a-42a.

1. Petitioner Paxson Electric Company (Paxson Electric), petitioner Dynalectric Company (Dynalectric), and a third electrical contractor, Fischbach and Moore, Inc. (Fischbach), all planned to submit bids in late 1979 on a $5 million electrical subcontract for a federally funded waste water treatment project in DeKalb County, Georgia, known as Snapfinger Creek. Petitioner Wesley C. Paxson, Sr., was the president of Paxson Electric. Petitioner Ewalt was the president of Dynalectric.

The evidence at trial showed that petitioners and Fischbach rigged their bids on the Snapfinger Creek project. Fischbach's Atlanta branch manager, Bernard Trepte,

testified that he met with Wesley Paxson and Walther Ewalt before the bids were to be submitted and agreed to rig the bids. The purpose of their agreement was to ensure that Paxson Electric would be the low bidder and would be selected for the job. In exchange, Paxson Electric agreed to forgive a pre-existing $89,000 debt that Fischbach owed it from an earlier project and agreed to give Dynalectric one-half of the profits that Paxson Electric would receive on the Snapfinger project. Paxson Electric was selected for the job and subsequently divided its $1.7 million profit with Dynalectric. Pet. App. 3a-4a.

Trepte's account of the bid-rigging agreement was corroborated by Paxson Electric and Dynalectric employees and by business records. The evidence showed that Dynalectric's bid was considerably higher than Dynalectric's branch manager had estimated that it would be. In addition, the evidence showed that petitioner Wesley Paxson directed his accountant to transfer the $89,000 Fischbach debt to the Snapfinger project and that no attempt was ever made to collect that debt. The evidence also established that Paxson Electric paid Dynalectric $880,000, approximately one-half of the profits on the Snapfinger project, even though Paxson Electric's affiliate, CCC Electric, had performed all the work and Dynalectric had not contributed any capital, equipment, or services to the project. See Pet. App. 4a, 27a-28a; 17 R. 1603-1604; 20 R. 2259, 2389-2391.[2]

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[2] Petitioners unsuccessfully argued at trial that the $880,000 payment was made pursuant to a silent joint venture between Dynalectric and Paxson Electric that was lawfully formed after the bids were submitted because Paxson feared that Ewalt would take the job away from him. 16 R. 1365; 20 R. 2387; 21 R. 2537. The evidence showed, however, that Paxson knew that his company had been designated as the electrical subcontractor by the general contractor at the time the bids were submitted; it also showed that the designation could not be

2. The court of appeals affirmed the convictions on all counts. Pet. App. 1a-42a. The court first rejected petitioners' contention that the prosecution was barred by the five-year criminal statute of limitations, 18 U.S.C. 3282. Contrary to petitioners' argument, the court of appeals concluded that the statute of limitations did not begin to run on the date on which the rigged contract was awarded.[3] Pet. App. 4a-17a. Adopting the position taken by every other court of appeals that has considered the issue, the court held "that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five-year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs." *Id.* at 8a-9a.[4] In this case, Dynalectric received its final payoff from Paxson Electric in 1983, and Paxson Electric continued to receive payments pursuant to the rigged contract until 1985 (*id.* at 4a); both events occurred well within the five-year period preceding the filing of the indictment.

The court of appeals also held that petitioners' mail fraud convictions were consistent with this Court's de-

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changed without Paxson Electric's consent. 13 R. 782; 19 R. 2078; 20 R. 2380; 22 R. 2724. The evidence further showed that the supposedly lawful silent joint venture was carefully kept secret both from the contracting authorities and from employees of Paxson Electric and Dynalectric. 9 R. 86-87; 13 R. 783; 16 R. 1310; 17 R. 1594-1595, 1640; 19 R. 2049; 20 R. 2387-2388; 21 R. 2402, 2436.

[3] The contract was awarded on January 14, 1980. The indictment was filed on September 16, 1986.

[4] The court rejected petitioners' reliance on the civil antitrust statute of limitations, 15 U.S.C. 15b, noting that it was not the appropriate statute of limitations in a criminal case. Pet. App. 13a. The court also found that "a central objective of a conspiracy to restrain trade is to garner illicit profits" and thus rejected petitioners' contention that a restraint of trade ends when the rigged bids are submitted. *Id.* at 14a.

cision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987). Pet. App. 17a-25a. The court pointed out that the indictment and the jury instructions in this case make it clear that the essence of the bid-rigging scheme was to defraud the scheme's victims of money. Unlike in *McNally*, the court concluded that the jury in this case must have based its verdict on a finding that petitioners had schemed to deprive their victims of money or property and could not have based its verdict on any deprivation of "intangible rights." Pet. App. 25a.

The court of appeals also rejected Paxson's contention that the government improperly used his immunized 1984 grand jury testimony to obtain the indictment and conviction in this case, in violation of *Kastigar* v. *United States*, 406 U.S. 441 (1972). Pet. App. 33a-37a. The court concluded that the government had "convincingly demonstrated an independent source for all portions of the evidence adduced before the indicting grand jury and at trial against Paxson which conceivably had any relation to his immunized testimony." *Id.* at 35a. The court similarly rejected Paxson's contention that he was entitled to an evidentiary hearing on the *Kastigar* issue. The court noted that the government had made a detailed showing that it had not used the immunized testimony. In addition, Paxson had access to all of the government's evidence supporting that showing. And in spite of having a full opportunity to do so, Paxson had failed to suggest any basis for challenging the government's showing. In those circumstances, the court of appeals concluded, the district court had not abused its discretion in denying a hearing. Pet. App. 36a-37a.

Finally, the court rejected petitioners' contention that the district court had abused its discretion in excluding certain evidence at trial. Pet. App. 26a-28a n.19. Petitioners sought to introduce evidence of instability in the economy

and various raw material markets. That evidence, they suggested, was relevant because it helped explain the seemingly high prices and profits on the Snapfinger project. The court of appeals affirmed the district court's ruling that the proffered evidence was irrelevant because "there was no evidence that any of the people who actually prepared the bids relied on the purported volatility" of market prices in preparing their bids. *Ibid.* The court also noted that the government had been barred from using evidence of unreasonably high prices and profits to establish the antitrust conspiracy. *Ibid.*[5]

ARGUMENT

1. Petitioners contend (88-1325 Pet. 11-14; 88-1328 Pet. 13-21) that the statute of limitations barred their prosecution because the indictment was returned more than five years after they submitted their rigged bids and the contract was awarded. The court of appeals correctly rejected that contention. It concluded that the bid-rigging conspiracy continued until the conspirators received and divided their anticipated profits on the illegal contract. Pet. App. 9a-10a. That ruling is in accord with the decisions of every other court of appeals that has addressed the question. *United States* v. *Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988); *United States* v. *Northern Improvement Co.*, 814 F.2d 540 (8th Cir.), cert.

[5] The court of appeals rejected numerous other challenges as well, several without discussion. Among the latter was the Dynalectric petitioners' contention that the district court erred in failing to instruct the jury on their defense that they acted pursuant to a lawful silent joint venture. 88-1328 Pet. 21-24. See Pet. App. 72a (district court ruling that petitioners' proposed instructions were "superfluous and confusing" and that the jury had properly been instructed that it must find that the charged bid-rigging agreement was made before the bids were submitted).

denied, 108 S. Ct. 141 (1987); *United States* v. *A-A-A Electrical Co.*, 788 F.2d 242, 244-246 (4th Cir. 1986); *United States* v. *Inryco, Inc.*, 642 F.2d 290, 293-295 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982).[6]

The principles governing the scope of a Sherman Act conspiracy were first enunciated by this Court in *United States* v. *Kissel,* 218 U.S. 601 (1910). In that case, the Court explained that a conspiracy is a partnership for criminal purposes that continues until its success or abandonment. *Id.* at 608, 610; accord *Hyde* v. *United States,* 225 U.S. 347, 369 (1912) (a conspiracy continues "until full fruition be secured"). Where there is no abandonment of

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[6] The Dynalectric petitioners rely on dicta in the *Inryco* case to suggest that the Ninth Circuit adheres to the narrower view that only overt acts that themselves restrain trade have the effect of continuing a Sherman Act conspiracy. 88-1328 Pet. 15-16. Although the *Inryco* court pointed out that there were such overt acts in the case before it, neither in *Inryco* nor in any other decision has the Ninth Circuit held that such acts are necessary for the conspiracy to continue. Moreover, in *United States* v. *Walker,* 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982), the Ninth Circuit held, under the general conspiracy statute, 18 U.S.C. 371, that if a conspiracy contemplates the division of the profits of an illegal scheme, the conspiracy continues for purposes of the criminal statute of limitations, regardless of whether the act of dividing the profits is itself illegal. *Id.* at 1350. The court in *Walker* also noted that that "seems to be one of the theories applied in *United States* v. *Inryco.*" *Ibid.* Petitioners' suggestion (88-1328 Pet. 16 n.22) that a Sherman Act conspiracy is different from other conspiracies for statute of limitations purposes is baseless. The same statute of limitations applies, and the courts of appeals before and after *Inryco* and *Walker* have correctly found no reason to adopt that distinction. See *Hyde* v. *United States,* 225 U.S. 347, 369 (1912) (applying the statute of limitations rationale of *United States* v. *Kissel,* 218 U.S. 601 (1910), a Sherman Act conspiracy case, to the general conspiracy statute). In short, petitioners' suggestion that the decision in the present case conflicts with the view of the Ninth Circuit is incorrect.

the goals of the conspiracy, it is the scope of the conspiratorial agreement that determines when the statute of limitations begins to run. *Grunewald* v. *United States,* 353 U.S. 391, 397 (1957).[7]

In this case, the indictment charged and the evidence showed that the agreement to rig bids included an agreement to divide the profits on the project.[8] The indictment

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[7] *Grunewald* does not hold that only conspiratorial objectives that are "criminal" serve to toll the statute of limitations. In *Grunewald,* the Court held only that proof that the conspirators concealed their illegal activities after the conspiracy had accomplished its objectives did not, by itself, establish that the concealment was part of the conspiracy. 353 U.S. at 402. *Grunewald* does not suggest that a conspiracy cannot be continued by acts that are legal and that it necessarily terminates on the last date on which the conspirators commit an act that is itself illegal.

[8] Petitioners suggest (88-1325 Pet. 12, 13; 88-1328 Pet. 15) that the statute of limitations began to run no later than the day that the bidding was completed, because after that date trade was no longer being "restrained" within the meaning of the Sherman Act. That suggestion is doubly wrong. First, as long as the conspiratorial agreement encompassed the receipt of profits on the rigged contract, acceptance of those profits continued the illegal conspiracy. Where a criminal conspiracy contemplates the receipt of illicit profits, the conspiracy continues until those profits are received, whether or not the charging statute makes the receipt of those profits illegal. *United States* v. *Girard,* 744 F.2d 1170, 1172 (5th Cir. 1984); *United States* v. *Helmich,* 704 F.3d 547, 549 (11th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Mennuti,* 679 F.2d 1032, 1035 (2d Cir. 1982); *Atkins* v. *United States,* 307 F.2d 937, 940 (9th Cir. 1962); *Koury* v. *United States,* 217 F.2d 387, 388 (6th Cir. 1954).

Second, trade was "restrained" every time DeKalb County and the federal agency involved in the project, the Environmental Protection Agency, made payments on the artificially set contract price. Petitioners might have abandoned their illegal enterprise at any time by giving notice of the fraud, making possible rescission of the illegal contract. Had they done so—thereby abandoning the conspiracy—the statute of limitations would have started to run at that time. *United*

was filed on September 19, 1986. Paxson Electric continued to receive its payments on the Snapfinger Creek project until at least January 1985, and it gave one-half of its anticipated profits to Dynalectric no earlier than 1983. The court of appeals was therefore correct in holding that the five-year statute of limitations did not bar this prosecution.[9]

2. Petitioners Paxson and Paxson Electric contend (88-1325 Pet. 14-18) that their mail fraud convictions are inconsistent with the decision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987), which held that the mail fraud statute is not violated by a scheme to defraud citizens of their intangible right to honest government services. The court of appeals correctly rejected that contention.

States v. *Kissel*, 218 U.S. at 610. Instead, petitioners continued to accept payments on the contract until 1985 and thereby continued their participation in the conspiracy. See *Hyde* v. *United States*, 225 U.S. at 369 ("Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law.").

[9] Because petitioners' offense continued until at least January 1985, when the last check was mailed to CCC Electric on the project (see Pet. App. 8a), Dynalectric's claim (88-1328 Pet. 17-18) that its sentence is unconstitutionally retroactive is also incorrect. Prior to its repeal, the "Alternative Fines" provision of the Criminal Fine Enforcement Act of 1984, 18 U.S.C. 3623(c)(1) (Supp. IV 1986), under which Dynalectric's enhanced fines were imposed, applied to "offenses committed after December 31, 1984." Pub. L. No. 98-596, §§ 6(a), 10, 98 Stat. 3137, 3138 (1984). Because the conspiracy continued past the effective date of Section 3623, the crime was within the coverage of that provision. See *United States* v. *Hartness*, 845 F.2d 158, 163 (8th Cir. 1988), cert. denied, 109 S. Ct. 308 (1988); *United States* v. *Giry*, 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, 108 S. Ct. 162 (1987); *United States* v. *Gibbs*, 813 F.2d 596, 601-602 (3d Cir. 1987), cert. denied, 108 S. Ct. 83 (1987); *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986).

The indictment in this case charged that the defendants committed mail fraud by defrauding DeKalb County and the United States Environmental Protection Agency of both "money" and "their right to free and open competition for the bidding on the electrical construction portion of the Snapfinger Creek project * * *." 88-1328 Pet. App. 63a. In charging the jury on the mail fraud counts, moreover, the district court defined a scheme to defraud to include "any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses money or property from the persons so deceived." 24 R. 3326. As the court of appeals observed (Pet. App. 24a), the charge did not include any instruction on an "intangible rights" theory of mail fraud. The record thus reflects that, in this case, unlike *McNally,* the indictment charged that the victims were defrauded of "money," and the trial court charged the jury that a scheme to defraud includes an intent to "obtain * * * money or property" by false pretenses. The convictions did not rest on an "intangible rights" theory of mail fraud, as did the convictions in *McNally.*

Petitioners Paxson and Paxson Electric argue for reversal (88-1325 Pet. 16-18) on the ground that the jury was not expressly instructed that it must find that the victims of the scheme actually suffered a deprivation of money or property. As the court of appeals ruled (Pet. App. 29a-31a), however, the mail fraud statute does not require that the fraudulent scheme actually succeed. Moreover, as we have explained, the instructions were adequate to ensure that the jury actually found a scheme to defraud DeKalb County and the federal government of money or property. Furthermore, to show a fraudulent deprivation of money it is sufficient to demonstrate that the victims parted with money under false pretenses. Cf. *McNally,* 107 S. Ct. at 2882 (condemning absence of jury instruction

that "petitioners obtained property by means of false representations").[10] In this case, DeKalb County awarded the contract on the false representation that the bids were competitive.[11]

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[10] In fact, the court of appeals found that there was sufficient evidence that the victims of the fraud were actually "overcharged," in that Paxson Electric received more money than it would have received under a competitively bid contract. Pet. App. 26a-28a. Petitioners' claim that there was no overcharge is based largely on the district court's explanations that the jury could not infer bid rigging from the size of the bids or the profits received. See 88-1325 Pet. 17. In addition to the direct evidence of overcharge, however, once the jury found from co-conspirator testimony and documentary proof that the bids in fact were rigged, the inference was clear that the prices resulting from the rigged bids were higher than prices that would have resulted from competitive bidding.

[11] Contrary to petitioners' contention (88-1325 Pet. 15), the court of appeals' holding does not conflict with the Tenth Circuit's decision in *United States* v. *Shelton,* 848 F.2d 1485 (1988). There, as in *McNally,* the defendant was a public official, and the mail fraud count was based on the allegation that, through the receipt of illegal kickbacks from road and bridge building suppliers, the defendant had deprived the citizens of Muskogee County of their right to honest government. 848 F.2d at 1495. The Tenth Circuit concluded that when the jury instructions were "read together," they permitted the jury improperly to convict the defendant, not on the ground that he had deprived his victims (the citizens) of money (because the kickbacks came from suppliers), but merely on the ground that he had deprived the citizens of their intangible right to honest government. *Id.* at 1496. In contrast, both the indictment and the jury charge in this case make plain that the verdict was based on the finding that petitioners schemed to defraud the victims – DeKalb County and the federal government – of money.

More generally, as the court of appeals noted (Pet. App. 19a-20a), the task of determining whether a particular jury in a particular case might have improperly relied on a theory precluded by *McNally* has not proved "impossible" (88-1325 Pet. 16) for the courts of appeals. Of course, the problem is of ever-diminishing importance, as it arises

3. Petitioners Paxson and Paxson Electric renew their argument (88-1325 Pet. 6-11) that the district court should have held an adversarial hearing on the claim that immunized testimony was improperly used at trial in violation of *Kastigar* v. *United States,* 406 U.S. 441 (1972). The court of appeals correctly rejected that argument.[12]

On September 28, 1984, Paxson testified pursuant to a grant of immunity before a grand jury that had been investigating bid rigging in the electrical construction industry for more than two years. Paxson was asked about bid rigging generally and about the Snapfinger Creek project in particular. He denied any knowledge of or involvement in rigging any jobs, including Snapfinger Creek. As the court of appeals noted (Pet. App. 36a), Paxson's testimony "drew the Snapfinger investigation to a halt for thirteen months" until Bernard Trepte was called before the grand jury and "revealed substantial inconsistencies with Paxson's immunized testimony about the Snapfinger project." Trepte's testimony, together with information that the grand jury had gathered in the two years before Paxson testified, led to the present prosecution.

In response to *Kastigar* motions, the government took steps to meet its burden of showing that its evidence against Paxson was independently derived. The government supplied the court with a 65-page affidavit and 50

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only out of pre-*McNally* trials. For the future, Congress has overturned *McNally* by amending the federal fraud statutes to cover schemes to deprive others of the intangible right to honest services. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508.

[12] This argument is, of course, open only to petitioner Wesley Paxson and not to petitioner Paxson Electric, because Wesley Paxson's immunized testimony could have been freely used against the company without violating any right of the company's. See generally *Braswell* v. *United States,* 108 S. Ct. 2284 (1988).

exhibits that "meticulously linked the independent sources of evidence * * * to each piece of evidence presented to the indicting grand jury and to be adduced against Paxson at trial." Pet. App. 34a. The magistrate, the district court, and the court of appeals, all of whom reviewed those submissions, concluded that the government had met and exceeded its heavy burden of showing that Paxson's self-serving, exculpatory grand jury testimony had not been used directly or indirectly in his criminal prosecution. *Id.* at 37a, 35a.[13]

Given the strength of the government's showing on the *Kastigar* issue in this case, the courts below correctly concluded that no useful purpose would have been served by

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[13] Relying on *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), the Paxson petitioners assert that the government's burden under *Kastigar* is particularly heavy when a government attorney familiar with immunized testimony participates in the prosecution of the case. 88-1325 Pet. 8. As petitioners recognize (88-1325 Pet. 8 n.5), however, the Eleventh Circuit is not in disagreement with the Eighth Circuit on this point. See Pet. App. 34a n.26; *United States* v. *Hampton*, 775 F.2d 1479, 1485-1486 (11th Cir. 1985).

The Eleventh Circuit simply concluded that the government had met its heavy burden in this case. Pet. App. 35a-36a. The facts here are quite different from those in *McDaniel*. There, the defendant had given three volumes of highly inculpatory evidence to a state grand jury, and the federal prosecutors, not knowing that the testimony had been given under a grant of immunity, prosecuted the defendant after reviewing the incriminating testimony. 482 F.2d at 307-308. Stressing the unusual circumstances of that case (*id.* at 312), the court held that, because the United States Attorney "could have perceived no reason to segregate McDaniel's [incriminatory] testimony from his other sources of information * * * the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by *Kastigar*." *Id.* at 311. In this case, by contrast, Paxson's grand jury testimony was exculpatory, and all of the government attorneys who reviewed it knew that it was immunized and could not be used in any subsequent criminal prosecution.

granting Paxson the evidentiary hearing that he had requested. By the end of the trial, Paxson had reviewed all of the government's submissions detailing the independent sources for its trial evidence and had heard all of the evidence adduced at trial. Nonetheless, he could not point to anything in the record to support his contention that the government had violated *Kastigar.*[14] In these circumstances, the court of appeals properly held that the denial of a "full-blown post-trial evidentiary hearing" was not an abuse of discretion. Pet. App. 36a-37a; see *United States* v. *Provenzano,* 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Lipkis,* 770 F.2d 1447, 1451 (9th Cir. 1985).[15]

4. The Dynalectric petitioners contend (88-1328 Pet. 21-24) that the district court improperly failed to instruct the jury on "the role of the Paxson-Dynalectric joint ven-

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[14] The Paxson petitioners state that an adversarial evidentiary hearing would have enabled them to "probe what uses may have been made of [Paxson's] testimony" (88-1325 Pet. 9), and they speculate that an unspecified, non-evidentiary use might have been made of the immunized testimony by unspecified government employees (*id.* at 8-9). A hearing that amounts to a fishing expedition is not warranted based only on such speculation. Through its pretrial and post-trial affidavits, the government demonstrated that it had independent sources for all of the evidence it adduced at trial, whether on direct or cross-examination, and petitioners offered nothing that cast doubt on that showing.

[15] The Paxson petitioners state that "long-established practice has been to grant adversarial hearings on *Kastigar* motions." 88-1325 Pet. 10. The only decision cited, however, *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977), does not support that contention. *Nemes* ruled, in this respect, only that where the government had satisfied the trial court "that the evidence presented to the federal grand jury and to the trial jury was derived from [independent] sources * * *," the government's burden under *Kastigar* was satisfied. *Id.* at 55 (footnote omitted).

ture" (*id.* at 22) or on the "lawfulness of the joint venture" (*id.* at 24). The instructions petitioners proposed, however, were misleading.

In particular, the Dynalectric petitioners' proposed "joint venture" instructions would have misled the jury into believing that, if an arrangement could be called a "joint venture," the bid-rigging agreement would be lawful. For example, the Dynalectric petitioners' proposed Instruction No. 18 would have required acquittal if Ewalt's bid-rigging agreement was "accompanied by or part of a legitimate joint venture or partnership with Paxson." 4 R. Doc. 92 at 28. Even if there was a "legitimate" joint venture between Paxson Electric and Dynalectric, however, that agreement was not a license for the two of them to rig bids with Fischbach, which was never alleged to be part of any "joint venture." Similarly, proposed Instruction No. 15 stated that "[i]t is also not illegal for contractors to bid for a job or to perform work as a legitimate joint venture. In a joint venture, two or more contractors join together and submit a single bid on a project." *Id.* at 22-23. In this case, however, Paxson Electric and Dynalectric did not submit "a single bid"; they submitted two separate bids, which led the letting authorities to believe the bids were independently derived. Thus, the requested instruction had no basis in the record.

In any event, the district court properly charged the jury on the elements of the Sherman Act offense. In order to convict, the jury was required to find (24 R. 3319, 3322-3323) "that a conspiracy to rig bids as alleged was knowingly formed and was existing at or before submission of the bids on September 7, 1979"; "that the conspiracy continued at least until September 20, 1981[;] and that one or more members of the conspiracy committed acts in furtherance of the conspiracy * * * on or after that date." Contrary to petitioners' claim (88-1328 Pet. 23),

therefore, the charge did not "amount[ ] effectively to a directed verdict against the defendants on the statute of limitations issue."[16] Nor did the instructions "force[ ] the jury to treat the joint venture itself as a *per se* Sherman Act offense." *Ibid.* The jury could not have returned a guilty verdict unless it found that the defendants agreed to rig bids.

5. Finally, the Dynalectric petitioners argue (88-1328 Pet. 24-27) that the court of appeals erred in affirming the district court's refusal to admit portions of petitioners' economic evidence. That argument is without merit. The evidence in question was irrelevant to the issues on which it was offered.

The district court gave petitioners the opportunity to show that their bids were legitimately prepared and were not "excessive" through evidence showing how their bids were prepared and showing the factors they took into account in bidding. The court refused, however, to prolong the trial with economic evidence of fluctuating copper prices and general market conditions, to be introduced from sources that had no familiarity with or personal knowledge of the Snapfinger bidding. Such evidence was properly excluded because no one who had prepared the bids claimed to have relied on copper prices and general market factors. 19 R. 2089-2098; 20 R. 2145-2151; 21 R. 2602-2613; 16 R. 1457-1460. Indeed, petitioner Ewalt admitted that there was no reference to fluctuating copper prices during the preparation of Dynalectric's bid. 16 R.

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[16] While the district court rejected petitioners' generalized "joint venture" instructions as "superfluous and confusing" (Pet. App. 72a), the instructions actually given clearly required that, to convict, the jury must find that the agreement to rig bids was made before the submission of the bids. It was immaterial whether the exact amount of consideration Dynalectric would receive was specified at that time. Compare 88-1328 Pet. 22 n.29.

1456. Hence, the evidence was not relevant to explaining why the bids were set as they were.[17]

Moreover, contrary to petitioners' suggestion (88-1328 Pet. 25), the government did not rely on the size of the bids or the profits as circumstantial proof of the existence of the conspiracy. The district court ruled in that context that it would not permit either petitioners or the government to argue the reasonableness or unreasonableness of prices and profits. 20 R. 2157. And the jury was expressly charged: "neither the amount of profits made by any of the defendants on the Snapfinger jobs nor the form in which those profits were ultimately paid or realized are relevant to the issue of whether the defendants agreed to fix or rig the bids. Rather, the proper focus is whether an agreement to rig the bids was made as alleged." 24 R. 3320. In these circumstances, there was no abuse of discretion in the district court's refusal to admit some of petitioners' economic evidence.

[17] That other courts permit defendants to introduce "*relevant* economic data" to support a claim that there was no agreement (88-1328 Pet. 26 (emphasis added)) does not create a conflict with the decision in this case, where the court held the particular economic evidence to be irrelevant.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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